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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. ~~905~~. 450

JOHN C. STALLCUP, PLAINTIFF IN ERROR,

vs.

THE CITY OF TACOMA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

FILED FEBRUARY 19, 1896.

(16,195.)

THE LAW ASSOCIATION
—OF—
PHILADELPHIA.

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1 JOHN C. STALLCUP, Plaintiff,
vs.
THE CITY OF TACOMA, Defendant. } 12920.

Transcript on Appeal.

[Seal Court of Pierce County.]

2 In the Superior Court of the State of Washington in and for Pierce County.

Dep't 3, Class 8.

JOHN C. STALLCUP, Plaintiff,
vs.
THE CITY OF TACOMA, Defendant. } No. 12920. Second Amended Complaint.

Comes now the above-named plaintiff and, complaining on behalf of himself and all other tax-payers in the city of Tacoma similarly situated, by leave of court first had and obtained, files this his second amended complaint herein, and alleges:

I.

That at all the times hereinafter mentioned the defendant was and is a municipal corporation of the first class, existing under and by virtue of the laws of the State of Washington, situate within the territorial limits of the county of Pierce, having a population not to exceed forty thousand (40,000) and not less than twenty-five thousand (25,000).

II.

That at all the times hereinafter mentioned the plaintiff was and now is a resident and citizen and a tax-payer of the said city of Tacoma and the owner of real estate and personal property therein subject to taxation for all State, county and municipal purposes.

III.

That a part of said real property includes lands subdivided into town lots, which was brought into the city of Tacoma by an election held on the 17th day of April, 1891, under ordinance No. 398, which ordinance provided for the extension of the territorial
3 limits of said city, and said part of said lands are rural and are not and have not been at all supplied with either light, water, or sewers; that in and by said extension of said limits eighteen square miles of territory were added to the limits of said city.

IV.

That at all the times hereinafter mentioned this plaintiff was and still is guaranteed by the constitution of the State of Washington of certain rights as provided by section 16, article 1, of said constitu-

tion, which is as follows: "Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic or sanitary purposes."

And by section 4 of article 4 of said constitution, which reads as follows: "The supreme court shall have original jurisdiction in *habeas corpus* and *quo warranto* and mandamus as to all State officers, and appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy or the value of the property does not exceed the sum of two hundred dollars ($200), unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review, prohibition, *habeas corpus*, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of *habeas corpus* to any part of the State upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself, or before the supreme court or before any superior court of the State, or any judge thereof."

4 Also section 7 of article 6, which reads as follows: "The legislature shall enact a registration law, and shall require a compliance with such law before any elector shall be allowed to vote; provided, that this provision is not compulsory upon the legislature, except as to cities and towns having a population of over five hundred inhabitants. In all other cases the legislature may or may not require registration as a prerequisite to the right to vote, and the same system of registration need not be adopted for both classes."

Also section 6 of article 8, which reads as follows: "No county, city, town, school district, or other municipal corporation shall for any purpose become indebted in any manner to an amount exceeding one and one-half per centum of the taxable property in such county, city, town, school district or other municipal corporation, without the assent of three-fifths of the voters therein voting at an election to be held for that purpose, nor in cases requiring such assent shall the total indebtedness at any time exceed five per cent. on the value of the taxable property therein, to be ascertained by the last assessment for State and county purposes previous to the incurring of such indebtedness, except that in incorporated cities the assessment shall be taken from the last assessment for city purposes; provided, that no part of the indebtedness allowed in this section shall be incurred for any purpose other than strictly county, city, town, school district, or other municipal purposes; provided, further, that any city or town, with such assent, may be allowed to become indebted to a larger amount, but not exceeding five per centum additional for supplying such city or town with water, artificial light and sewers, when the works for supplying such water, light and sewers shall be owned and controlled by the municipality."

The charter of the city of Tacoma contains, and at all
5 the times herein stated did contain, the following provisions:

SECTION 45. "All legislative acts of the city council shall be by ordinance, the subject of which shall be clearly set out in its title and no ordinance shall contain more than one subject."

SECTION 49. "No ordinance obligating the city for the payment of more than one thousand dollars * * * shall be passed before the second regular meeting of the city council after its introduction, nor until read in full at two regular meetings of the council."

And during all of said times this plaintiff was and is still further guaranteed by the provisions of the fifth and fourteenth amendments to the Constitution of the United States that he should not be deprived by any State of life, liberty, or property without due process of law, and that by virtue of the facts hereinafter stated this plaintiff has been and, unless the defendant is restrained as hereinafter prayed, will be deprived of his property without due process of law, and he invokes the protection of all the provisions herein set forth and referred to touching his property rights.

V.

That prior to a time of a certain pretended sale hereinafter mentioned of a pretended light and water plant and works to the city of Tacoma the Tacoma Light & Water Company, a corporation, claimed and pretended to be the owner of certain water works and supplies and electric-light plant constructed and maintained by said company for the purpose of furnishing water and light to the inhabitants of said city of Tacoma, but in truth and in fact one C. B. Wright, who was at all the times hereinafter mentioned and now is a non-resident of the State of Washington, and who was and is
6 a resident of the city of Philadelphia, in the State of Pennsylvania, was at all such times hereinafter mentioned the real owner and holder of all the capital stock of said corporation and the property of said corporation, but for the purposes of properly officering said corporation under the laws of the State of Washington and having agents to manage the said property for him he caused certain shares of said stock to be owned and held by certain persons residents of Tacoma, and the said property was accordingly held and managed.

That said light plant consisted of certain arc lights, poles, and other appliances for electric light without any exclusive right or franchise from said city therewith, and the cost price of said electric-light plant did not exceed the sum of one hundred and twenty-five thousand dollars ($125,000) and of no greater value than said amount.

And that said water works and plant consisted of certain iron pipes laid upon a very small portion and part of the streets and territory of the said city, and a certain wooden flume extending about five (5) miles in length to a creek called Clover creek, two (2) pumping engines, two (2) pumps, one (1) reservoir, one (1) stand-

pipe, and certain town lots and acreage land, with no exclusive rights or franchise from said city to furnish said city or its inhabitants thereof with water nor to lay pipes in the streets of said city, which said property did not exceed in value the sum of four hundred thousand dollars ($400,000) at any of the times hereinafter mentioned.

That prior to and at the time of the transactions hereinafter described the said C. B. Wright and his said corporation were supplying a portion of the said city and inhabitants thereof with water diverted from said Clover creek through and by means of said flume, pipes, reservoir, engines, and stand-pipe, and claimed and pretended to have right to so divert and supply said water from said creek, and likewise claimed and pretended to own certain Thomas and Patterson springs upon the said acreage land, and the right to divert and convey the water therefrom to the city of
7 Tacoma, but never had diverted any water from said springs, but in truth and in fact, as hereinafter more particularly set forth, said Tacoma Light & Water Company nor said C. B. Wright had any right whatever to take, use, or divert any of the waters from said Clover creek or said Thomas and Patterson springs.

VI.

That said C. B. Wright being desirous of selling said properties to said city at an unfair and unconscionable price and for the purpose of cheating and defrauding the said city of Tacoma and the taxpayers, the said Tacoma Light & Water Company, and said C. B. Wright, together with their agents, servants, and employees, fraudulently and corruptly conspired together and with certain officers of said city, whose duty it was to guard the interests of said city therein, and under whose power and control the ordinance hereinafter mentioned was passed and who on the part of the city had the management and control of the purchase thereof, as hereinafter stated, to deceive, cheat, and wrong said city by falsely and deceitfully misrepresenting the value, character, extent, and existence of the properties and rights proposed to be sold.

And in furtherance of said corrupt undertaking and conspiracy the officers of said city caused the rural and outlying and unimproved lands and real property in said city to be assessed for taxation at a value in excess of the actual value thereof and contrary to the provisions of the revenue acts of the State of Washington, which provide that property shall not be assessed for taxable purposes in excess of its actual value; that said illegal and unlawful assessment was made by the officers of said city to the end and with the purpose that it might appear by such assessment that the taxable property in said city was large in amount for taxable
8 purposes, to the end and with the purpose of thereby exceeding the real limits of the constitution of the State limiting the rights of the city to create a debt for supplying said city with light, water, and sewers to five per cent. of the value of the taxable property thereof.

That, in pursuance of said conspiracy and for the purpose of procuring the passage of the said ordinance hereinafter mentioned, the said Tacoma Light & Water Company and said C. B. Wright, by their agents, servants, and employees, together with such officers of said city as they could corrupt as aforesaid, did falsely and deceitfully represent to the other officials of said city of Tacoma that the property of said water works and supplies and that the purchase thereof would include the title to and the right to divert the flow and use of the water from said Thomas and Patterson springs, and also the title to and the right to use and divert and appropriate all the waters flowing into said Clover creek, together with the rights of way to conduct all of said water to said city of Tacoma, and that at the driest season of the year the daily flow from said sources was not less than twenty million (20,000,000) gallons per day of pure and fresh water.

And the said light & water company and the said C. B. Wright, by their agents, servants, and employees, together with such officers of said city as they could corrupt, as aforesaid, did falsely and deceitfully represent to the other officials of said city of Tacoma that the water supply from said Thomas and Patterson springs and from said Clover creek would be sufficient in amount to supply the inhabitants of said city of Tacoma and said city of Tacoma with a sufficient amount of pure, fresh water for all purposes, including water necessary for manufactories.

Whereupon the mayor and common council of said city of Tacoma did pass the following ordinance, to wit:

9 *Ordinance No. 790.*

An ordinance to provide for the purchase of the water works and electric-light plant, and all such water supplies, riparian rights, rights of way, lands, lots, personal property, and franchises as are now owned or operated by the Tacoma Light & Water Company as part of such water and electric-light plants, excepting their distributing system in the town of Puyallup; and for extending said water works and making additions thereto by the adoption of a gravity system of water works; to declare the estimated cost of said additions and extension; to provide for borrowing money to be used in payment therefor by issuing the negotiable coupon bonds of said city for the sum of two million one hundred and fifty thousand dollars; and to provide for calling a special election for submitting such questions to the qualified voters of said city for their ratification or rejection.

Be it ordained by the city of Tacoma:

SECTION 1. That the offer of the Tacoma Light & Water Company to sell the water works and electric-light plant, and all such sources of water supplies, riparian rights and rights of way, lands, lots, personal property and franchises as are now owned and operated by the Tacoma Light & Water Company, as part of such water and electric-light plants, excepting their distributing system in the town

of Puyallup, for the sum of one million seven hundred and fifty thousand dollars be and the same is hereby submitted to the qualified voters of the city of Tacoma upon the terms and subject to the conditions hereinafter particularly specified.

SEC. 2. If said city shall become the owner of said water works and electric-light plant and sources of supply it will extend said water works by additions thereto by a gravity system so that the same shall be sufficient to adequately supply the said city and its inhabitants with pure, fresh water sufficient for all their necessary uses, which extensions shall be substantially as follows: Thirty-eight inch conduit pipe from Patterson and Thomas springs to the reservoir of the Tacoma Light & Water Company in the city of Tacoma, distant from said Patterson springs about sixteen miles, and distant about thirteen miles from said Thomas springs, connections from reservoir site to station "B" of the Tacoma Light and Water Company near the intersection of Hood and O streets in said city; the erection of a hydraulic pump at a suitable junction of the waters of the said springs; the estimated cost of which extensions is four hundred thousand dollars.

SEC. 3. For the purpose of borrowing money to be used in payment for said water works, electric-light plant and sources of supply, and for the construction of said extension to said water works, the city of Tacoma shall issue its negotiable coupon bonds for the sum of two million one hundred and fifty thousand dollars, payable to bearer twenty years from the date thereof, with interest at the rate of five per centum, payable semi-annually; both principal and interest shall be payable in gold coin of the United States of America of the present standard of weight and fineness, at such banking-house or trust company in the city of New York as shall be designated in said bonds.

SEC. 4. The mayor is hereby authorized and directed in case of the ratification by the qualified voters of said city, at an election for the submission of said proposition as hereinafter provided, to issue in the name of said city, signed by himself as mayor, attested by the city clerk under the seal of said city, and countersigned by the city controller, two thousand one hundred and fifty negotiable coupon bonds of one thousand dollars each, to be designated upon the face thereof "Water and light bonds of the city of Tacoma," with interest thereon as provided in the third section thereof; which bonds shall be numbered respectively from one to two thousand one hundred and fifty, and shall when so signed, attested and countersigned be delivered by the mayor to the sinking-fund commission of said city for sale and negotiation as hereinafter provided.

SEC. 5. The said sinking-fund commission shall negotiate the sale of said bonds, after having duly advertised the same for sale at least thirty days preceding the day of sale; provided that said bonds shall not be sold for less than par and accrued interest. Said sinking-fund commission shall immediately upon the receipt of the moneys received for said bonds pay all moneys so received into the city treasury.

SEC. 6. In case of the ratification of the said proposition by the

qualified voters of said city at the special election herein provided for, the said sinking-fund commission is authorized and instructed upon the execution and delivery by the said Tacoma Light & Water Company of a good and sufficient deed, with covenants of warranty to vest in said city a perfect title to said water works, electric-light plant and sources of supply, said deed to be approved by the city council, to pay out of the money received for the sale of said bonds, to the said Tacoma Light & Water Company, the sum of one million seven hundred and fifty thousand dollars, the sum to be accepted by said company in full payment therefor.

SEC. 7. That a special election be held in and for said city upon the eleventh day of April, A. D. 1893, for the purpose of submitting to the qualified voters thereof the question whether said city shall purchase the water works and electric-light plant and the sources of supply owned by said Tacoma Light & Water Company, for the sum of one million seven hundred and fifty thousand dollars, and construct additions and extensions thereto at an estimated cost of four hundred thousand dollars; and whether said city shall borrow the sum of two million one hundred and fifty thousand dollars to be used for the payment therefor, and issue its negotiable coupon bonds for said sum.

SEC. 8. The form of ballot to be used at said election shall be "Shall the city of Tacoma purchase the water works and electric-light plant and sources of supply of the Tacoma Light & Water Company for the sum of one million seven hundred and fifty
12 thousand dollars; and construct extensions to said water works at an estimated cost of four hundred thousand dollars, and borrow the sum of $2,150,000, to be used for said purpose, and issue its negotiable bonds therefor?" All persons in favor of said proposition shall vote as follows: "For the purchase of the water works, electric-light plant and sources of supply of the Tacoma Light & Water Company, and the construction of extensions to said water works; and the issuing of the negotiable coupon bonds of the city therefor." Those voting against said proposition shall vote as follows: "Against the purchase of the water works, electric-light plant and sources of supply of the Tacoma Light & Water Company and construction of extensions to said water works; and the issuing of the negotiable coupon bonds of the city therefor."

SEC. 9. Said election shall be held at such voting places in the several precincts of said city, and shall be conducted by such judges and inspectors of elections as may be hereafter designated and appointed, and shall be conducted in all respects as provided by the charter of said city and the general laws of the State of Washington. The city clerk shall give at least thirty days' notice of the time, place and purpose of said election, and of the proposition to be submitted thereat, together with the form of ballot to be used; which notice shall be published in the city official newspaper for thirty days next preceding said election, and shall be posted for the like period at all of the places designated therein for holding said election.

SEC. 10. This ordinance shall immediately after its passage and

approval by the mayor be published in the official newspaper of said city for three days consecutively, and shall take effect upon the expiration of such publication.

Passed March 4, 1893.

HARRIS A. CORELL,
President of Council.
H. S. HUSON, *Mayor.*

Attest: S. J. SMYTH, *City Clerk.*

Approved March 6, 1893.

13 *Ordinance No.* 791.

An ordinance designating the places of voting in the various election precincts in the city of Tacoma and appointing certain persons judges and inspectors in each of said precincts for a special election to be held on the 11th day of April, 1893, as provided for in ordinance No. 790.

Whereas it has been provided by ordinance No. 790 that a special election be held on the 11th day of April A. D. 1893, for the purpose of submitting to the qualified voters of the city of Tacoma whether the said city purchase the water and light plants now owned and operated by the Tacoma Light & Water Company, and make certain extensions thereof, and issue its negotiable bonds in payment therefor, and

Whereas, the laws of the State of Washington and the charter of the city of Tacoma, provide for the calling of such special election for such purpose; therefore,

Be it ordained by the city of Tacoma:

SECTION ONE. That in pursuance of the city charter and the laws of the State of Washington, and in pursuance of ordinance No. 790 which provides for the calling of a special election on the 11th day of April A. D. 1893 for the purpose of submitting to the qualified voters of the city of Tacoma whether the said city purchase the light and water plant now owned and operated by the Tacoma Light & Water Company, and make certain extensions thereof, and issue its negotiable bonds in payment therefor, a special election be held in the city of Tacoma and in the several precincts thereof, on the 11th day of April, A. D. 1893, for the purposes aforesaid.

SEC. 2. That the following places in the several election precincts into which the several wards of the city are divided, are designated as the places of holding the said special election, and the following-named persons are hereby appointed to serve as judges, in-

14 spectors and clerks to conduct said election in the respective precincts aforesaid.

Passed March 6, 1893.

Attest: S. J. SMYTH, *City Clerk.*

Approved March 6, 1893.

HARRIS A. CORELL,
President of Council.

H. S. HUSON, *Mayor.*

VII.

That the cases of Edmund Seymour *vs.* The City of Tacoma, in which decisions were given by the supreme court of the State of Washington and reported in volume —, Washington Reports, and also in 33 Pacific Reporter, at pages 832 and 1059, pertain in a very limited extent to some of the facts, and two of the questions involved herein set forth, namely, that of excessive amount of debt and as to registration law.

That said Edmund Seymour was in said cases and proceedings *was* the agent of C. B. Wright and Tacoma Light & Water Company and brought and prosecuted said cases from beginning to ending, not in the interest of tax-payers, but in the interest of said C. B. Wright and said Tacoma Light & Water Company, and accordingly did the city attorney of the said city of Tacoma, then acting therein, collude and connive with said Seymour and his attorneys to the end to suppress and not allege or present the true facts and questions of the case so made and to suppress and not allege the facts herein set forth, and did, in furtherance of this design, hasten and rush said cases through from the commencement thereof to final decision in the said supreme court in less than thirty days, and did therein and thereby practice a fraud on the said supreme court and also the superior court in which said cause originated, and did successfully exclude therefrom all the facts herein alleged and the questions herein presented, all by the procurement of said Wright and said Tacoma Light & Water Company.

15 VIII.

That at the time said ordinance No. 790 was passed and at the time said pretended election provided for by said ordinance was held, to wit, on the 11th day of April, 1893, the legislature of the State of Washington had passed no law by virtue of which said pretended election could be held; that no registration of the voters and electors of the city of Tacoma was had; that no means or machinery were provided by the officers of said city of Tacoma or by law whereby it was possible to ascertain at the time of said pretended election who were qualified voters entitled to vote at said pretended election, and the said pretended election was held without any registration system or registration of the voters, without any pretense of a registration of the voters, and without any other provision to ascertain who the legal voters were, and without any pretense of any registration or other provision, notwithstanding the charter of said city contained a like provision in reference to the constitutional provisions heretofore referred to touching the registration of the voters.

That after the passage of said ordinance No. 790 and until the pretended election of April 11, 1893, was held under said ordinance to determine whether or not the city should purchase said properties as represented by said light and water company and said. C. B. Wright the said light & water company and said C. B Wright. for the purpose of inducing persons to vote in favor of

said purchase proposition, continued persistently to represent to the people of said city that the property included all that hereinbefore mentioned and fraudulently, falsely, and knowingly represented that the income and profit to said company and said C. B. Wright from said property had been and was largely in excess of the actual profit and income therefrom; that by said false and fraudulent representations and by the use of large sums of money to bribe and corrupt persons voting at said pretended election to vote in favor of said proposition and by such bribery and corruption a large number of ballots were cast at said pretended election in favor of said purchase proposition by persons who would not have so voted had it not been for such bribery and corruption, and that of this class there were in number no less than two hundred (200); that at said pretended election more than one hundred and fifty (150) persons who were residents and citizens of Lewis and other counties than Pierce, in the State of Washington, voted at said pretended election in favor of said proposition, each and all of whom were not residents or inhabitants of said city of Tacoma or said Pierce county, Washington, and had no right to vote therein, but who did vote in fact in favor of said purchasing proposition at said pretended election.

That by reason of the absence of an election law by which elections of this character could be governed the conspiracy of said C. B. Wright and said light & water company and their fellow-conspirators among the officers of said city was enabled to succeed, and they, the said conspirators, thereby did succeed in their criminal and illegal purpose in causing to be cast and counted at said pretended and lawless election in favor of said purchasing proposition the said three hundred and fifty (350) votes, each and all of which and more were illegal and which would not have been possible but for the want of registration of voters, as provided by the terms of the constitution (of the) State of Washington hereinbefore set forth.

That the result of said pretended election, counting each and all of said illegal, fraudulent, and corrupt votes, was declared by the officers of said city who had said matter in charge as follows: In favor of said purchase, thirty-two hundred (3,200) votes; against said purchase, nineteen hundred and eighty-one (1,981) votes; blank, twenty-six (26) votes; total, fifty-two hundred and seven (5,207) votes, showing thereby in counting said illegal, fraudulent, and corrupt votes cast in favor of said purchasing proposition that said purchasing proposition had carried by only seventy-six (76) votes, and there was and is no law providing for contesting or setting aside said election.

IX.

That at the time of making said false and fraudulent representations said C. B. Wright and said Tacoma Light & Water Company knew that said representations were false, and that a large number of persons within the city of Tacoma who voted at said election in favor of said purchasing proposition believed said representations to

be true and relied upon the same, and, believing the same to be true, voted in favor of said purchasing proposition, and would not have done so had they known the truth of the facts as they existed at said time in reference to the quantity, qu*la*ity, and existence of the property pretended to be owned by said light & water company and said C. B. Wright — they proposed to sell to said city.

That in truth and in fact the said Wright nor the said light & water company did not have nor did the purchase hereinafter mentioned bring with it the right to divert any of the water flowing from said Clover creek or said Thomas and Patterson springs nor the right of way to bring said water or any of it to the city of Tacoma, and that the flow of water at the driest season of the year did not exceed eight million (8,000,000) gallons per day from said sources and all of them, and that said light and water company and said C. B. Wright knew all of these facts at the time of making said false and fraudulent representations as aforesaid, and that since said pretended election and the suit of riparian owners on said Clover creek it has been judicially determined that the said Wright
18 and the said Tacoma Light & Water Company were without any right whatever to divert the said water from said Clover creek, and they, together with the said city, were perpetually enjoined in said suit by the superior court in and for Pierce county from diverting the same, and the said judgment was thereafter affirmed by the supreme court of the State, and the city is now perpetually restrained from taking any water whatever from said Clover creek.

X.

That prior to the issuing of the bonds hereinafter mentioned the said city of Tacoma had become and was indebted, for the purpose of constructing and establishing sewers in the city, in the sum of over twenty-one thousand dollars, which was a legal and valid indebtedness of said city of Tacoma, and was to be paid out of the funds derived from taxation of personal and real property within the territorial limits of said city, and that prior to and at the time of said pretended election and that prior to and at the time of issuing the bonds hereinafter mentioned said city of Tacoma had incurred legal and valid indebtedness for its corporate purposes, exclusive of light, water, and sewerage purposes, in excess of one and one-half per cent. of its taxable property as shown by the then last assessment for corporate and municipal purposes, and that no election had been held authorizing said city to become indebted to any extent than said one and one-half per cent. of its taxable property for corporate purposes other than for sewers, light, and water, and that at all times since said pretended election and since the issuing of the bonds hereinafter mentioned said indebtedness of said city has exceeded said one and one-half per cent. limit and still exceeds it, and no election has been held authorizing an increase above said one and one-half per cent. limit for such corporate purposes.

XI.

That at the time of said pretended election, on the 11th
19 day of April, 1893, and at all times thereafter, including the time which the bonds hereinafter mentioned were issued by said city of Tacoma, and at the present time, the valuation of the taxable property in said city of Tacoma, including personal and real property of whatever nature and kind, subject to taxation for municipal purposes has not and did not exceed the sum of thirty million dollars ($30,000,000), but the assessed valuation as shown by the last assessment prior to said election and prior to the issuing of the bonds hereinafter mentioned for municipal purposes was the sum of forty-one million five hundred and fifty-three thousand four hundred and forty dollars ($41,553,440), and that the valuation of the real and personal property within said city of Tacoma as shown by the assessment thereof for municipal purposes for the year 1894 was the sum of twenty-six million four hundred and fifty-two thousand eight hundred and twelve dollars ($26,452,812), and so still remains.

XII.

That persons voting at said pretended election voted upon an issue by said city of $2,150,000 negotiable interest coupon bearing bonds for the purchase of said pretended properties and the extensions in said ordinance referred to and therein mentioned and voted upon the same as an entire proposition and for an entire issue of the bonds for said amount, and that the form of ballot used at said pretended election was as follows, to wit:

"Shall the city of Tacoma purchase the water works and electric-light plant and sources of supply of the Tacoma Light & Water Company for the sum of one million seven hundred and fifty thousand dollars and construct extensions to said water works at an estimated cost of four hundred thousand dollars and borrow the sum of $2,150,000 to be used for said purpose and issue its negotiable bonds therefor?"

20 That after said election and on or about the 25th day of June, 1893, in pursuance *to* said conspiracy, the said officials of said city of Tacoma prepared and executed for delivery the negotiable coupon interest-bearing bonds of said city in the sum of two million eighty thousand dollars ($2,080,000), which are, under and by virtue of the laws of the State of Washington and the provision of said ordinance, to *to* be sold for not less than par, the proceeds of such sale to be used in the purchasing of said pretended properties for the sum of $1,750,000 and the balance of the proceeds from such sale to be used in a pretended extension of the pretended water works to the pretended Thomas and Patterson springs.

XIII.

That by the laws of the State of Washington at the time and ever since the issuing of said bonds there was no provision or right to issue coupon bonds or negotiable bonds or authority vested in a

municipality such as said defendant to issue any other than registery bonds.

XIV.

That by reason of the said departures from due procedure, the *pre*petration of the said frauds, and the violation of the law of the land in the premises the said bonds were invalid and it was impossible to sell the said bonds so as aforesaid provided and prepared for money at all.

Wherefore and whereupon the said C. B. Wright, in writing, over his own signature, did propose to the said defendant city to exchange the said pretended light and water properties for said bonds to the extent of $1,750,000 thereof; whereupon the said city by resolution of its council did accept the said proposition and did thereupon send a committee with said bonds to said Wright, at Philadelphia, and then and there deliver the said bonds in
21 the aggregate sum of $1,750,000 to said Wright in exchange for a deed conveying to said defendant city the said certain pipes, flume, engines, reservoir, stand-pipe, town lots, and acreage land, but no water, water supply, nor right to water nor to divert water from any spring, stream, lake, or other source was thereby conveyed or intended to be conveyed or obtained, nor did said deed contain any guaranty or warrant of any such right.

That neither said Wright nor said Tacoma Light & Water Company then or at any time ever owned any water supply or right to water or to divert water from any stream, lake, spring, or other source for their own or the city's use; that no such right or any right to water was sold to or acquired by said city in said transaction at all.

That said Wright still retains, holds, and controls said bonds and remains out of the State of Washington, and has not since been in the State and refuses to come into the State.

That the balance of said issue of bonds so prepared and executed, to wit, in the sum of $330,000, were sold to the said C. B. Wright for money at par, the proceeds of which were lost to the city by the defalcation of the city's treasurer, and it was made possible so to be diverted, squandered, and lost to the defendant city because there was no water supply at the so-called Thomas and Patterson springs, nor right to divert any flow therefrom; that the said extension pretense was accordingly exposed and necessarily abandoned; that said proceeds were left in the hands of said treasurer, who became and is a defaulter as such in the sum exceeding four hundred thousand dollars.

That by reason of the indebtedness of the said city being in excess of the constitutional limitation for corporate purposes in having no money and no funds and having the said issue of bonds to the full extent of the constitutional limitation for water, light, and sewer supply outstanding in the hands of said Wright, it is unable to acquire any water supply in the said city, and the said
22 city was and is unable to acquire the right to continue the taking of water from said Clover creek, in consequence

whereof the taking of water from said source was finally enjoined by decree of this court in obedience to the mandate of the supreme court, so that if said bonds are not invalid, and accordingly treated by the city, the city is bereft of all means and power by which to supply the city and its inhabitants with water, and likewise deprived of the power to acquire the water from the sources heretofore supplied, and remain in extreme want thereof while there is ample of pure and fresh water for supplying the city and inhabitants thereof accessible to said city and if the city had means with which to secure the same.

That the amount of the coupon interest accruing upon said $1,750,000 bonds for six months is $43,750, and the said city has made a levy upon the taxable property in said city of — mills for the purpose of paying the interest coupons upon the $1,750,00- of said bonds held by said Wright, and are now proceeding by the duly constituted officers for the collection of the taxes of the said city to collect the same for that purpose, and if not restrained therefrom will collect and pay the same to and for said purpose, and unless restrained will continue to levy and collect money to pay the accruing interest on said bonds, and levy and collect money to pay the principal thereof, to the irreparable damage of the plaintiff, and plaintiff is without any adequate remedy at all, and the defendant city threatens to, and will, unless restrained, proceed to sell plaintiff's property and procure said money for said purpose.

Wherefore plaintiff prays that the defendant, its agents and officers, be restrained from collecting said levy aforesaid, or any levy for said purpose, and that they be restrained from paying anything on said bonds and coupons at all, to the end that the said Wright, or any other who claims to hold any of said bonds or coupons and claims that the same are valid, may come into court and submit such claims to adjudication, and for such other and further
23 relief as the court may deem equitable and just.

BEN SHEEKS,
FRANK H. GRAHAM, AND
A. R. TITLOW,
Attorneys for Plaintiff.

STATE OF WASHINGTON, }
County of Pierce, } ss:

I, John C. Stallcup, being first duly sworn, upon oath say that I am the plaintiff above named; that I have read the above and foregoing second amended complaint, know the contents thereof, and believe the allegations therein contained are true.

JOHN C. STALLCUP.

Subscribed and sworn to before me this 20th day of April, 1895.

A. S. DAUTRICK,
Deputy Clerk.

Filed Apr. 22, 1895.

W. A. FAIRWEATHER, *Clerk,*
By A. S. DAUTRICK, *Deputy.*

24 In the Superior Court of the State of Washington in and for the County of Pierce.

JOHN C. STALLCUP, Plaintiff,
vs.
CITY OF TACOMA, Defendant. } No. 12920. Demurrer.

Comes now the defendant in the above action and demurs to the second amended complaint for the reasons following:

I.

That the plaintiff has no legal capacity to sue.

II.

That there is a defect of parties defendant.

III.

That complaint does not state facts sufficient to constitute a cause of action.

Wherefore defendant asks that said action be dismissed.

JAMES WICKERSHAM,
City Attorney, and
D. J. CROWLEY,
Of Counsel for Defendant,
503 *Chamber of Commerce B'ld'g, Tacoma, Washington.*

Rec'd copy of the above 27th day of April, 1895.

BEN SHEEKS,
FRANK H. GRAHAM, AND
A. R. TITLOW,
Att'ys for Plaintiff.

Filed in open court, dep't No. 3, 27 day of April, 1895.

W. A. FAIRWEATHER, *Clerk.*
E. L. GARRETSON, *Deputy.*

25 In the Superior Court of the State of Washington in and for Pierce County.

Dep't 3, Class 8.

JOHN C. STALLCUP, Plaintiff,
vs.
THE CITY OF TACOMA, Defendant. } No. 12920. Order Sustaining Demurrer.

Now, on this 27th day of April, 1895, this cause coming on regularly for hearing on the demurrer of the defendant, The City of Tacoma, to the second amended complaint of the plaintiff herein, said demurrer having this day been filed, and the court having fully considered the same after submission of the same by counsel for the respective parties, it is ordered by the court that said de-

murrer be, and is hereby, in all things sustained, and to which plaintiff excepts and his exceptions are allowed, and counsel for plaintiff at this time, in open court, after the sustaining of said demurrer to the second amended complaint herein, announces that the plaintiff will stand upon his complaint and refuses to plead further.

Wherefore it is ordered, adjudged, and decreed by the court, after the announcing of the plaintiff that he will stand upon his complaint and refuse to plead further, that plaintiff's bill, complaint, and action be, and is hereby, dismissed, and that the defendant, The City of Tacoma, have and recover from and of the plaintiff, John C. Stallcup, its costs and disbursements in this action; to each and every part of which order and judgment of the court plaintiff excepts, and his exceptions are allowed.

Whereupon, after the court having granted its final judgment in this cause of dismissing the bill and complaint of plaintiff herein, and rendering judgment for the costs against said plaintiff in favor of said defendant, said plaintiff, by his attorneys, in
26 open court, immediately after the rendition of said order, judgment, and decree of dismissal and judgment for costs, gives notice of appeal from the order, judgment, and decree of the court dismissing plaintiff's bill, complaint, and action, and rendering judgment for costs against plaintiff and every part thereof, and sustaining said demurrer prior thereto, which he desired to have taken up with said appeal from said order, judgment, and decree of dismissal to the supreme court of the State of Washington.

And thereupon said appeal is by the court allowed, and, upon the motion of plaintiff for an order of the court fixing the amount of a supersedeas or stay bond upon appeal to the supreme court, it is by the court ordered and adjudged, to stay all further proceedings in this action for the execution of this decree in this cause entered in this court, that plaintiff shall file and enter a good and sufficient supersedeas and stay bond in the sum of two hundred dollars ($200), and that in so doing all further proceedings in this court shall be stayed until the final termination of this cause in the supreme court.

EMMET N. PARKER, *Judge.*

Ent., dep't No. 3, Journ. 41, page 540, April 27th, 1895.
Entered, Ex. Doc. No. 15, page 417.

27 In the Superior Court of the State of Washington in and for Pierce County.

Dep't 3, Class 8.

JOHN C. STALLCUP, Plaintiff,
vs.
THE CITY OF TACOMA, Defendant. } No. 12920. Appeal Bond.

Know all men by these presents that we, John C. Stallcup, above-named plaintiff, appellant and principal herein, and Mary S.

Stallcup and H. M. Thomas and John J. Crowley, as sureties, are held and firmly bound, jointly and severally, unto the above-named defendant, The City of Tacoma, a municipal corporation of the first class under and by virtue of the laws of the State of Washington, in the sum of two hundred dollars; for the payment of which we bind ourselves, our heirs, executors, administrators, assigns, and legal representatives, firmly by these presents.

Dated this 29th day of April, 1895, at Tacoma, Pierce county, Washington.

The conditions of the above and foregoing obligation are such that whereas, on this 29th day of April, 1895, the above-named John C. Stallcup, plaintiff, appellant and principal herein, being aggrieved by the judgment, order, and decree of the above-named court rendered in the above-entitled action dismissing his bill, complaint, and action, and rendering judgment against him as plaintiff in said cause for costs and disbursements in favor of said defendant, City of Tacoma; and

Whereas said John C. Stallcup above named did, on said day, by his attorneys, give notice of appeal from said order, judgment, and decree so rendered to the supreme court of the State of Washington:

Now, therefore, if said John C. Stallcup, plaintiff, appel-
28 lant and principal herein, shall pay all costs and damages that may be awarded against him on said appeal or on the dismissal thereof, not exceeding the sum of two hundred dollars, then this obligation shall be null and void and of no effect; otherwise it shall be and remain in full force and effect.

Witness our hands this 29th day of April, 1895.

JOHN C. STALLCUP, *Principal.*
MARY S. STALLCUP, *Surety.*
HATTIE M. THOMAS, *Surety.*
JOHN J. CROWLEY.

STATE OF WASHINGTON, }
County of Pierce, } ss:

I, John J. Crowley, one of the above-named sureties, being first duly sworn, upon oath say that I am one of the above-named sureties on the above and foregoing named obligation; that I am a resident of Tacoma, Pierce county, Washington, and have within the said State of Washington property belonging to me over and above all my just debts and exemptions from execution, and which property is subject to execution in my separate right, of the value and worth of more than two hundred dollars.

JOHN J. CROWLEY.

Subscribed and sworn to before me this 30th day of April, 1895.

F. S. BLATTNER,
[SEAL.] *Notary Public in and for the State of Washington, Residing at Tacoma, Pierce County, Washington.*

STATE OF WASHINGTON, } ss:
County of Pierce, }

I, Mary S. Stallcup, one of the above-named sureties, being
29 first duly sworn, upon oath say that I am one of the above-named sureties on the above and foregoing named obligation; that I am a resident of Tacoma, Pierce county, Washington, and have within the said State of Washington property belonging to me over and above all my just debts and exemptions from execution, and which property is subject to execution in my separate right, of the value and worth of more than two hundred dollars, and that I am neither a clerk, sheriff, attorney, or any officer of any court of record within the State of Washington.

MARY S. STALLCUP.

Subscribed and sworn to before me this 30th day of April, 1895.

H. W. LUEDERS,
[SEAL.] *Notary Public in and for the State of Washington, Residing at Tacoma, Pierce County, Washington.*

STATE OF WASHINGTON, } ss:
County of Pierce, }

I, H. M. Thomas, one of the above-named sureties, being first duly sworn, on oath say that I am one of the above-named sureties upon the foregoing obligation; that I am a property-owner in the said county of Pierce and have therein property belonging to me over and above all my debts and exemptions from execution, and which property is subject to execution in my own right and name, of the value and worth of more than four hundred dollars.

HATTIE M. THOMAS.

Subscribed and sworn to before me this 30th day of April, A. D. 1895.

H. W. LUEDERS,
Notary Public in and for the State of Washington, Residing at Tacoma, in said County of Pierce.

Filed Apr. 30, 1895.

W. A. FAIRWEATHER, *Clerk,*
By JOS. JOHNS, *Dep.*

Entered, Book of Bonds No. F, pages 338, '39, '40.
Entered, Ex. Doc. 15, page 417.

30 In the Superior Court of the State of Washington in and for Pierce County.

Dep't 3, Class S.

JOHN C. STALLCUP, Plaintiff,
vs.
THE CITY OF TACOMA, Defendant.
} No. 12920. Supersedeas & Stay Bond on Appeal.

Know all men by these presents that we, John C. Stallcup, as principal and the above-named plaintiff and appellant, and Mary S. Stallcup and H. M. Thomas and John J. Crowley, as sureties, are held and firmly bound, jointly and severally, unto the above-named defendant for the payment of two hundred dollars ($200); for the payment of which we bind ourselves, our heirs, executors, administrators, and legal representatives, firmly by these presents.

Dated at Tacoma this 29th day of April, 1895.

The conditions of the above and foregoing obligation are such that whereas, on the 27th day of April, 1895, in the above-entitled action, the above-named court rendered its final judgment in the above-entitled cause against said plaintiff, John C. Stallcup, dismissing his bill, complaint, and action in the above entitled cause and rendered judgment for costs and disbursements against him in favor of said above-named defendant, The City of Tacoma; and whereas at said time said plaintiff, feeling aggrieved by said order, judgment, and decree, gave notice, in open court, of appeal from the same to the supreme court of the State of Washington, and, desiring a stay of all proceedings in the above-named court on said judgment and order appealed from and every part thereof, asks an order of the court fixing the amount of a supersedeas and stay bond for said purpose, and said court having made its order fixing the
31 amount of the supersedeas and stay bond in the sum of two hundred dollars, and staying all such proceedings upon the execution of such bond, good and sufficient in substance and form:

Now, therefore, if said appellant, John C. Stallcup, shall satisfy and perform the judgment, order, and decree and each and every part thereof appealed from in case it shall be affirmed and any judgment or order which the Supreme Court may render or make or order to be rendered or made by the superior court, then this obligation shall be null and void and of no effect; otherwise it shall be and remain in full force and effect.

Witness our hands this 29th day of April, 1895.

JOHN C. STALLCUP, *Principal.*
MARY S. STALLCUP, *Surety.*
HATTIE M. THOMAS, *Surety.*
JOHN J. CROWLEY.

STATE OF WASHINGTON,
County of Pierce,
} *ss:*

I, John J. Crowley, one of the above-named sureties, being first duly sworn, upon oath says that I am one of the above-named sureties on the above and foregoing named obligation; that I am

a resident of Tacoma, Pierce county, Washington, and have within the said State of Washington property belonging to me over and above all my just debts and exemptions from execution, and which property is subject to execution, in my separate right of the value and worth of more than two hundred dollars.

JOHN J. CROWLEY.

Subscribed and sworn to before me this 30th day of April, 1895.

FRANK S. BLATTNER,

[SEAL.] *Notary Public in and for the State of Washington, Residing at Tacoma, Pierce County, Washington.*

32 STATE OF WASHINGTON, } *ss:*
County of Pierce, }

I, Mary S. Stallcup, one of the above-named sureties, being first duly sworn, upon oath say that I am one of the above-named sureties on the above and foregoing named obligation; that I am a resident of Tacoma, Pierce county, Washington, and have within the said State of Washington property belonging to me over and above all my just debts and exemptions from execution, and which property is subject to execution, in my separate right of the value and worth of more than two hundred dollars, and that I am neither a clerk, sheriff, attorney, or any officer of any court of record within the State of Washington. MARY S. STALLCUP.

Subscribed and sworn to before me this 30th day of April, 1895.

H. W. LEUDERS,

Notary Public in and for the State of Washington, Residing at Tacoma, Pierce County, Washington.

STATE OF WASHINGTON, } *ss:*
County of Pierce, }

I, H. M. Thomas, one of the above-named sureties, being first duly sworn, upon oath say that I am one of the above-named sureties upon the foregoing obligation; that I am a property-owner in the said county and have therein property belonging to me over and above all my debts and exemptions from execution, and which property is subject to execution, in my separate right of the value and worth of more than two hundred dollars.

HATTIE M. THOMAS.

Subscribed and sworn to before me this 30th day of April, A. D. 1895.

H. W. LEUDERS,

[SEAL.] *Notary Public in and for the State of Washington, Residing at Tacoma, Pierce County, Washington.*

Filed April 30, 1895.

W. A. FAIRWEATHER, *Clerk,*
By JOS. JOHNS, *Dep.*

Entered, Book of Bonds No. F, page- 336, '37, '38.
Entered, Ex. Doc. No. 15, page 417.

33 In the Superior Court of the State of Washington for Pierce County.

JOHN C. STALLCUP, Plaintiff,
vs.
THE CITY OF TACOMA, Defendant. } No. 12920. Certificate.

I, W. A. Fairweather, county clerk and, by virtue of the laws of the State of Washington, *ex officio* clerk of the superior court of the State of Washington for Pierce county, do hereby certify that the annexed and foregoing is a full, true, and correct copy or transcript of so much of the record and files as the appellant deems material to the review of the matters embraced within his appeal and as I have been by appellant directed to prepare in the above-entitled action now — file in this office.

In witness whereof I have hereunto set my hand and seal of the said superior court, at my office, in the city of Tacoma, this 10th day of June, 1895.

[SEAL.] W. A. FAIRWEATHER, *Clerk*,
By A. S. DAUTRICK, *Deputy*.

34 [Endorsed:] No. 1893. Filed Jul- 24, 1895. C. S. Reinhart, clerk.

35 JOHN C. STALLCUP, Appellant,
vs.
CITY OF TACOMA, Respondent. } No. 1893. Filed Nov. 29, 1895.

This action was brought by the appellant, a citizen and tax-payer of the city of Tacoma, for himself and all others similarly situated, against the respondent city to enjoin it from paying the interest on 1,750 negotiable interest-bearing bonds of the denomination of $1,000.00 each, said bonds having been issued by the respondent city and delivered to one C. B. Wright and to the Tacoma Light and Water Company, a corporation (of which said corporation the said Wright is the principal stockholder), in exchange for a certain light and water plant, water supply, and equipment.

The lower court having sustained the demurrer of the respondent to appellant's complaint, and the appellant having elected to stand by his pleading, judgment was rendered below dismissing said action, from which judgment and from the order sustaining said demurrer this appeal is prosecuted. The complaint is very voluminous, comprising some twenty-one closely typewritten pages.

The conclusion reached by us renders it unnecessary to consider many allegations contained in it. Appellant assails the validity of the bonds for two principal reasons: 1st, because the election at which the voters of the city authorized their issuance was held without any registration, contrary to the provisions of the constitution of the State, and, 2nd, that the aggregate amount of the bonds authorized at the election so held was in excess of the limit of indebtedness fixed by the constitution.

This is the third case which has been before this court involving

the legality of said election. The first case was that of Seymour *vs.* City of Tacoma and The Tacoma Light and Water Company, and is reported in 6 Wash., 138. The second cause was between the same parties, and is reported in 6 Wash., 427. The first of
36 these cases was instituted prior to the time of holding the election and for the purpose of having the ordinance which provided for the submission of the proposition to the voters adjudged invalid and void, and for the further purpose of enjoining and restraining the city and its officers from calling or holding said election and from expending the funds of said city for that purpose. The second cause was instituted subsequent to the election, but prior to the issuing of the bonds. Its purpose was to enjoin the city and its officers from issuing said bonds or from attempting to obligate said city for the payment thereof. Each of said causes was prosecuted by the plaintiff as a citizen and tax-payer in his own behalf and in behalf of all other tax-payers of the city similarly situated. In the first case above referred to this court construed the ordinance under which the proposition to purchase the plant and issue said bonds was submitted to the legal voters of said city; also the act of the legislature of March 26, 1890, authorizing cities to purchase water works and light plants, and upon the subject of registration the court then said: "We have but one registration law in this State, which is found in chapter 8, Gen. Stat. Sec. 467 declares that the provisions of the law shall apply to all elections for municipal and other officers, but we fail to find any application of it to elections of this kind. Section 9 of the charter (of respondent city) requires registration 'as provided by the general laws of the State,' and section 13 declares that no person shall be entitled to vote unless he is a qualified elector under the State laws and has registered 'as provided by law.' But, there being no State law requiring registration at elections of this character, these provisions of the charter are inoperative and any elector can vote."

In referring to what was said by this court in that case the learned counsel for the appellant herein say in their brief, "The court very properly decided that the registration statutes did not apply to elections of that character," and in appellant's complaint in this case it is alleged that "the legislature of the State of Washington
37 has passed no law by which said pretended election (for voting on issuing bonds) could be held," because of its failure to make provision for registration; but appellant insists that the opinion in that case relating to registration was based on the statute alone, and that the counsel for the respective parties to that litigation suppressed the true facts in that case, and that the provision of the constitution of this State upon the subject of registration was not called to the attention of the court.

The provision of the constitution referred to is section 7, article 6, and is as follows: "The legislature shall enact a registration law and shall require a compliance with such law before any elector shall be allowed to vote: Provided that this provision is not compulsory upon the legislature except as to cities and towns having a population of over 500 inhabitants. In all other cases the legisla-

ture may or may not require registration as a prerequisite to the right to vote, and the same system of registration need not be adopted for both classes." It is conceded that said city of Tacoma now has and at the time of the election herein referred to and for many years prior thereto had a population exceeding 25,000. The appellant further insists that inasmuch as the legislature of the State of Washington has not made provision for registration for elections of this character there is no constitutional basis or authority for holding such an election, and that the bonds for that reason are absolutely void. The Seymour case, first above cited, was decided by this court before the bonds which appellant here seeks to have adjudged invalid were issued, and if this were the sole and controlling question in the decision of this case we should, in view of the fact that bonds of the city negotiable in form were thereafter issued, hesitate before promulgating a decision discrediting said bonds for any reason which existed at the time when said former case was pending and which it would have been the right of parties to have urged therein.

38 This court will take judicial notice of its records and of what issues were presented for determination by the record in a given cause, and will not entertain or consider an allegation of the character contained in paragraph 7 of the complaint herein when it appears from an inspection of such record that the matters so alleged are unfounded.

Many of the allegations of the complaint herein relate to questions which were distinctly raised in the pleadings in the Seymour cases above cited, and extended arguments were made upon them in the briefs of counsel therein, and such questions have been disposed of by this court in rendering judgment in said cases.

The contention of counsel that the constitutional necessity for registration was not urged upon the court's attention in the first Seymour case is unfounded. An inspection of the briefs in that case discloses that the question was discussed, and 14 pages of the brief of the respondent therein were entirely devoted to the discussion of the claim that registration was essential to the validity of the then proposed election, said discussion treating of constitutional as well as statutory requirements, and, while it is true that mention of the constitutional provision is not made in the opinion of the court in that case, it does not follow that it did not receive the consideration of the court.

The rule is that "a decision once made in a particular controversy by the highest court empowered to pass upon it is conclusive upon the parties to the litigation and their privies, and they are not allowed afterwards to revive the controversy in a new proceeding for the purpose of raising the same or any other questions. * * * Whatever the question involved—whether the interpretation of a private contract, the legality of an individual act, or the validity of a legislative enactment—the rule of finality is the same."

Cooley's Constitutional Limitations, 5th ed., page 58.

It is true that the appellant was not a nominal party in Seymour *vs.* City of Tacoma, *supra* still it is also probably true that
39 as a tax-payer he could not be heard to urge any objection to the validity of the bonds that could not be urged by the city were the controversy between it and the holder of the bonds, and it is familiar law that a judgment bars not only every defense actually raised or set up in the action, but also every other defense which might have been urged therein.

Cromwell *vs.* County of Sac, 94 U. S., 351.
Burlen *vs.* Shannon, 99 Mass., 200.
Howard *vs.* City of Huron, 60 N. W., 803.
Herman on Estoppel & *Res Adjudicata*, section 121.

And we think there is little reason and less authority for excepting municipal authorities from this general rule.

We do not mean to be understood as holding that parties are to be concluded by decisions obtained by others in fictitious controversies or as a result of fraud and collusion or where an imposition has been practiced upon the court.

But, as already noticed, the Seymour cases were brought by a tax-payer in behalf of himself and all others similarly situated. The city was the principal defendant there, as it is the sole defendant here, and there is identity in the subject-matter of the litigation. In the first of said cases it was urged that the ordinance passed by the city authorities for submitting the propositions to purchase the plant and to issue the bonds, which ordinance was set out in the complaint in that action, was void, and an injunction was asked restraining the officers of the city from calling an election to submit said propositions to the legal voters of the city because of the alleged invalidity of the ordinance. This court on appeal held the ordinance valid and effectual.

In the second case, brought after the result of the election on the propositions so submitted to the electors had been declared, but prior to issuing the bonds, an injunction was sought for the purpose of restraining the city and its officers from issuing the bonds because of the illegality of the election and the invalidity of the bonds. The recitals expressed upon the face of the bonds
40 were set out in the complaint, which complaint also contained the allegation that "the debt to be incurred by the issuance of said bonds * * * will be more than five per centum (the limit of indebtedness as fixed by the constitution) of the taxable property in said city as ascertained by the last assessment made for city purposes." This court upon appeal held that the proceedings attending the election were regular and that the bonds (excepting only as to $70,000.00, which the court authorized to be deducted from the total amount to be issued) did not exceed the limit of indebtedness imposed by the constitution. Necessarily the question of the validity of the bonds involved in this controversy was decided in that case.

Gallaher *vs.* City of Moundsville, 12 S. E. R., 859.

We do not think that the complaint in this action charges such fraud in the conduct of the cases herein referred to as the "Seymour cases" as will operate to defeat the binding effect of the decisions rendered therein. For that purpose we think the allegations of the complaint wholly insufficient, and especially so when considered in connection with what is disclosed by the records of this court.

But if we adopt the view that appellant has taken with regard to this court's decision in the first of the so-called "Seymour cases" and proceed to the investigation and determination of this constitutional question, uninfluenced by anything determined in that case, we think that the contention of counsel that no election for the purpose of issuing bonds can legally be held in a city or town of this State having a greater population than 500 inhabitants, because of the failure of the legislature to make provision for the registration of voters at such election, is not well founded. The case differs widely from one where the legislature has made provision for registration and parties neglect to comply therewith. We think that the prohibition of the constitution against voting does not apply until after a registration law has been passed and a compliance therewith made possible to the voter. If we are right in this view it is easy to understand why it was not deemed pertinent to
41 make mention of the constitution in the first Seymour case; but we think that additional reasons may be adduced to demonstrate the unsoundness of appellant's construction of article 6, section 7, of the constitution. By reference to that section it will be seen that if registration is a *sine qua non* to the right to vote at an election of this character the same would be true at all elections—general as well as special elections—held for the purpose of choosing State, county, or city officers, as well as elections of the character here in question.

"Constitutional provisions concerning the qualifications of voters apply to all elections, whether general or special."

McCrary on Elections, section 14.

People *vs.* Canady, 73 N. C., 198.

Hence, if appellant's position is well taken, the conclusion necessarily is that had the legislature entirely failed to pass any registration law (instead of merely passing a law requiring registration at elections for State and other officers) an election of any character within this State, or at least within towns and cities having a population exceeding five hundred, would have been legally impossible, inasmuch as the constitutional provision has reference to elections of the one kind as well as the other, and until the legislature made provision for registration no election for any purpose could be legally held. If this be the correct view of the constitution we might well inquire how (after the adoption of the constitution) was an election possible. We were then without a registration law and according to appellant's contention could hold no election until one was passed. Without a legislature (the members of which the constitution required to be elected) no registration law could be passed, and without a registration law no legislature could be elected. *Re-*

ductio ad absurdum. By parity of reasoning all cities and towns in the State containing a population exceeding five hundred should have been excluded from participating in the election held for selecting members of Congress and State officers and putting the machinery of the State government in motion.

In construing a provision of the constitution as well as in
42 the construction of a statute or contract regard must be had to its several provisions and all of its parts. If any part of it be susceptible of two constructions that one should be adopted which will not only best harmonize with other provisions, but also give effect to every agency which is provided by it to make the State government effective.

Section 1, article 6, of the constitution provides that "All male persons of the age of 21 years possessing the following qualifications shall be entitled to vote at all elections, * * *" and while it may be that section 7, article 6, *supra*, is binding upon the conscience of the legislature and imposes the duty of acting, nevertheless the failure to act ought not to be construed so as to deprive the citizen possessing the qualifications prescribed by section 1 of that article of his constitutional right to vote. It would, of course, be competent for the legislature, either with or without constitutional mention of the subject, to provide by appropriate legislation for testing the voters' right and preserving the purity of the ballot, but "when the constitution prescribes the qualifications, whoever possesses them has a constitutional right to vote, and of this right he cannot be deprived by legislative enactment." McCrary on Elections, section 17.

Our conclusion is that the right to vote in this State at any election, general or special, resides in those possessing the qualifications prescribed by section 1, article 6, of the constitution, subject only to compliance with such reasonable provisions respecting registration and regulating the exercise of the right as the legislature may provide, but the mere failure or neglect of the legislature to make any provision for registration does not operate to deprive those having the qualifications of the constitution from exercising the elective franchise.

Concerning the other objection above noticed, viz., that the amount of bonds authorized at the election was in excess of the limit of indebtedness fixed by the constitution, little need be said.

As already noticed, that question was directly involved in
43 the second Seymour case, 6 Wash., 427, where it received the extended consideration of this court, and was directly passed upon. For this reason we decline to consider it further. Respondent contends, and we think justly, that parties purchasing such bonds have a right to rely upon the law as declared in these decisions, and such has been the repeated holding of the Supreme Court of the United States.

Lee Co. *vs.* Rogers, 7 Wallace, 181.

Harshman *vs.* Knox County, 122 U. S., 306.

Gelpcke *vs.* City of Dubuque, 1 Wallace, 176.

We are unable to perceive how the question of the validity of the bonds is affected by the allegation that the treasurer defaulted with $300,000.00 of the funds of the city. Nor do we think that the court should enquire concerning the motives which induced the voters of the city to incur this indebtedness, as, under the constitution of this State, the propriety of becoming indebted for procuring light and water is committed to such voters.

The remaining allegations of the complaint are directed to questions which, in our view, ought not to be considered by a court of equity without having all of the parties directly affected by the decree before it. These bonds were issued pursuant to legislative authority and the provisions of the freeholders' charter of the city of Tacoma. From an examination of the legislative enactments and the charter provisions we think the bonds are in law what, in fact, they purport to be—negotiable bonds—that is, bonds having all of the incidents of negotiability, and which in the hands of a holder for value before maturity cut off defenses, and to the payment of which the faith and credit of the city are unquestionably pledged. Such being their character, the court would, it seems to us, be doing an idle and vain thing in decreeing them invalid. Such a decree could have no binding force as against strangers to the record.

Board *vs.* Texas and Pacific R. W. Co., 46 Texas, 316.

Hoppock *vs.* Chambers, 56 N. W. (Mich.), 86.

"No court can adjudicate directly upon a person's right without the party being either actually or constructively before the court."

44 Mallow *vs.* Hinde, 12 Wheaton (U. S.), 193.

In Shields *vs.* Barrow, 58 U. S., 129, it is said that the court "can make no decree affecting the rights of an absent person, and can make no decree between the parties before it which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit without affecting those rights."

This question engaged the attention of the Supreme Court of the United States in a very recent case, California *vs.* Southern Pacific Company, 157 U. S., 229, in which Chief Justice Fuller, speaking for the court, says:

"Sitting as a court of equity, we cannot, in the light of these well-settled principles, escape the consideration of the question whether other persons who have an immediate interest in resisting the demand of complainant are not indispensable parties or at least so far necessary that the cause should not go on in their absence. Can the court proceed to a decree as between the State and the Southern Pacific Company and do complete and final justice without affecting other persons not before the court or leaving the controversy in such a condition that its final termination might be wholly inconsistent with equity and good conscience?"

And the court decided in that case "that the bill must be dismissed for want of parties who should be joined."

The demurrer to the complaint was properly sustained, and the judgment of the superior court is affirmed.

GORDON, *J.*

We concur:
HOYT, *C. J.*
SCOTT, *J.*
ANDERS, *J.*

I did not agree with the conclusion reached by the majority in Seymour *vs.* Tacoma, reported in 6th Wash., 428. Nevertheless it was the decision of this court, and as, in my judgment, the legal questions involved here were settled by that decision, I feel compelled to concur in the result above announced.

DUNBAR, *J.*

45 In the Supreme Court of the State of Washington.

JOHN C. STALLCUP, Plaintiff and Appellant,
vs.
THE CITY OF TACOMA, a Municipal Corporation, Defendant and Respondent.
} Petition for Rehearing.

Comes now the above-named plaintiff and appellant, through his attorneys, Ben Sheeks, Frank H. Graham, and A. R. Titlow, and petitions the supreme court of the State of Washington for a rehearing of said cause, the said court having on the 29th day of November, 1895, rendered a decision in said cause affirming the judgment of the superior court of the State of Washington in and for Pierce county rendered against said plaintiff and appellant, and by this petition for rehearing respectfully shows unto this honorable court that said cause when in said superior court tried was tried upon demurrer to the second amended complaint, which second amended complaint, among other things, states and alleges clearly and emphatically as follows:

I.

That the enforcing and collection of interest on the $1,750,000 bonds which it is the object of this suit to prevent would be taking illegally and without due process of law plaintiff's property in this cause.

II.

That said seventeen hundred and fifty bonds for $1,000 each are now and have been ever since they were traded by the city
46 of Tacoma to C. B. Wright and the light & water company in the hands and possession of and owned by said light & water company and said C. B. Wright.

(*a.*) That said C. B. Wright and said light & water company procured said bonds by false and fraudulent representations, setting forth the representations and the fraud and facts.

(*b.*) That the city of Tacoma obtained no water supply for which said bonds were traded.

(*c.*) That at the time of issuing the seventeen hundred and fifty bonds, upon which plaintiff is trying to stop the payment of interest, there was an outstanding indebtedness for sewer purposes, in the shape of bonds, of the sum of $21,000, and at that time the city did issue in one series $2,080,000 of light and water bonds, making $2,101,000 for the three purposes of light, water, and sewers. Five per cent. of the assessment-roll, which was in force at that time, as shown by the complaint and the former decision of this court, would amount to $2,080,000.

(*d.*) That *in* the election held to vote upon the acquiring of water works by the city by purchase for $1,750,000 and the extension of said water works after the purchase to cost $400,000, for which bonds were issued, were one entire proposition, viz., to secure the water works as they existed and the extension as contemplated and outlined.

(*e.*) That the constitution of the State of Washington is absolutely mandatory on cities of over five hundred inhabitants, as to registration of voters at such election, to determine whether or not water works should be acquired.

47 (*f.*) That the semi-annual interest due on said seventeen hundred and fifty bonds held by Wright and the light & water company amounts to something over $47,000, which plaintiff and all other tax-payers for which he has brought suit have to bear the burden, and that said Wright is without the jurisdiction of this court and refuses to come therein.

(*g.*) And that in the issuing of said bonds in the form that they were issued they would be void for the want of power of the city to issue, as it is not empowered to issue negotiable bonds, neither did it have the power to trade the same to said Wright and water company for a supposed water plant.

These facts and each and all of them having been admitted upon demurrer, which the court will know when it once examines the second amended complaint, the decision of this court seems strange indeed to counsel for appellant. We submit—

1. That we can see no rule for establishing a higher sacredness to these bonds than to any other negotiable instrument, and that a negotiable instrument of the very highest and rarest character and most sacred in the eyes of the commercial law can be attacked for want of consideration, for fraud in its execution, or for forgery or any other material defect or infirmity when held by the original parties to the transaction, and if there ever was a case in existence where there are many infirmities and defects and material fraud connected with the execution and getting possession of bonds it is in this case, and the complaint so alleges.

2. We submit that the court is wrong, as a question of fact, when it says in its decision that the construction of the consti-

48 tution of the State of Washington in relation to registration being necessary in cities of over five hundred in relation to this very water election had been construed and passed upon and considered by the court in the case of Seymour *vs.* The City of Tacoma, and with all due respect to this honorable court, yet with

a feeling that this court should carefully consider facts, we submit herewith as a part of this petition for rehearing the brief in the case of Seymour *vs.* The City of Tacoma, which is referred to in the decision of this court in this cause, and most respectfully point out to the court that in the complaint in said brief set forth there is no mention of the proposition of registration, and that there is nowhere within the covers of said brief a discussion of the constitution in this connection, and even no mention of the constitution in said connection, save and except on page 68, wherein it refers indirectly to the State constitution as follows: "Of course such decisions can have no application in this State, as the constitution itself provides for registration; but they serve to illustrate the strictness with which all laws should be construed as against defeating the right of suffrage." Which brief we here insert at this place and as a part of this petition.

49 In the Supreme Court of the State of Washington, January Session, 1893.

EDMUND SEYMOUR, Appellant,
against
THE CITY OF TACOMA, HERBERT S. HUSON, S. J. SMYTH, and TACOMA LIGHT AND WATER COMPANY, Respondents.

Transcript and Briefs.

Alfred E. Buell, appellant's attorney.
F. H. Murray and Galusha Parsons, respondents' attorney.

Filed March 17th, 1893.

50 In the Superior Court of the State of Washington in and for the County of Pierce.

EDMUND SEYMOUR, Plaintiff,
vs.
THE CITY OF TACOMA, HERBERT S. HUSON and S. J. SMYTH, and THE TACOMA LIGHT AND WATER COMPANY, Defendants.

Complaint in Equity.

The complaint of the above-named plaintiff for himself and other property-owners and tax-payers in the city of Tacoma, respectfully shows:

I. That he is a resident in said city, and is the owner of real
51 and personal property therein, subject to taxation for all proper municipal purposes.

II. That the defendant, The City of Tacoma, is a municipal corporation of the first class. That the defendants, Herbert S. Huson and S. J. Smyth, are respectively the mayor and city clerk of said city.

III. That the defendant, The Tacoma Light and Water Company,

is a corporation duly incorporated under the laws of said State, and as such is the owner of certain water works in said city, constructed for the purpose of supplying said city and its inhabitants with water for all their necessary uses. That it is also the owner of an electric-light plant, constructed and operated in part for lighting the streets of said city, and supplying it with electric light for its corporate uses; the right to construct and maintain said plants for the purposes aforesaid, was conferred upon the defendant, The Tacoma Light and Water Company, by the ordinances of said city.

52 IV. That the defendant, The Tacoma Light & Water Company, has offered and proposed by an offer in writing made to and filed with the city council of the said city, to sell to said city its said water works and said electric-light plant as the same are now used at said city for the sum of one million, seven hundred and fifty thousand dollars ($1,750,000.00); that the real purpose proposed by the issuance of said bonds is to borrow money to be used in payment for said water works and electric-light plant; the full sum to be paid immediately upon the execution and delivery of a deed therefore specified in said ordinance, and the approval thereof by the city council.

V. That the said city has, by its city council, accepted said proposition by an ordinance as follows:

Ordinance No. 790.

An ordinance to provide for the purchase of the water works and electric-light plant, and all such water supplies, riparian
53 rights, right of way, lands, lots, personal property and franchises as are now owned or operated by the Tacoma Light and Water Company as part of such water and electric-light plants, excepting their distributing system in the town of Puyallup; and for extending said water works and making additions thereto by the adoption of a gravity system of water works; to declare the estimated cost of said additions and extension; to provide for borrowing money to be used in payment therefor by issuing the negotiable coupon bonds of said city for the sum of two million one hundred and fifty thousand dollars; and to provide for calling a special election for submitting such questions to the qualified voters of said city for their ratification or rejection.

Be it ordained by the city of Tacoma:

SECTION 1. That the offer of the Tacoma Light and Water Company to sell the water works and electric-light plant, and all such sources of water supplies, riparian rights of way, lands, lots, personal property and franchises as are now owned or operated by the Tacoma Light and Water Company, as part of such water and electric-
54 light plants, excepting their distributing system in the town of Puyallup, for the sum of one million seven hundred and fifty thousand dollars be and the same is hereby submitted to the qualified voters of the city of Tacoma upon the terms and subject to the conditions hereinafter particularly specified.

SEC. 2. If said city shall become the owner of said water works and electric-light plant and sources of supply it will extend said water works by additions thereto by a gravity system so that the same shall be sufficient to adequately supply the said city and its inhabitants with pure, fresh water sufficient for all their necessary uses, which extensions shall be substantially as follows: Thirty-eight-inch conduit pipe from Patterson and Thomas springs to the reservoir of the Tacoma Light and Water Company in the city of Tacoma, distant from said Patterson springs about sixteen miles, and distant about thirteen miles from said Thomas springs, connections from reservoir site to station "B" of the Tacoma Light & Water Company near the intersection of Hood and "O" streets in said city; the erection of a hydraulic pump at a suitable junction of the waters of said springs; the estimated cost of which extensions is four hundred thousand dollars.

55 SEC. 3. For the purpose of borrowing money to be used in payment for said water works, electric-light plant and sources of supply, and for the construction of said extension to said water works, the city of Tacoma shall issue its negotiable coupon bonds for the sum of two million one hundred and fifty thousand dollars, payable to bearer twenty years from the date thereof, with interest at the rate of five per centum per annum, payable semi-annually; both principal and interest shall be payable in gold coin of the United States of America of the present standard of weight and fineness, at such banking-house and trust company in the city of New York as shall be designated in said bonds.

SEC. 4. The mayor is hereby authorized and directed in case of the ratification by the qualified voters of said city, at an election for the submission of said proposition as hereinafter provided, to issue in the name of said city, signed by himself as mayor, attested by the city clerk under the seal of said city, and countersigned by the city controller, two thousand one hundred and fifty negotiable coupon bonds of one thousand dollars each, to be designated upon the face thereof "Water and light bonds of the city of Tacoma," with

56 interest thereon as provided in the third section hereof; which bonds shall be numbered respectively from one to two thousand one hundred and fifty, and shall when so signed, attested and countersigned be delivered by the mayor to the sinking-fund commission of said city for sale and negotiation, as hereinafter provided.

SEC. 5. The said sinking-fund commission shall negotiate the sale of said bonds, after having duly advertised the same for sale at least thirty days preceding the day of sale; provided that said bonds shall not be sold for less than par and accrued interest. Said sinking-fund commission shall immediately upon the receipt of the moneys received for said bonds, pay all moneys so received into the city treasury.

SEC. 6. In case of the ratification of the said proposition by the qualified voters of said city, at the special election herein provided for, the said sinking-fund commission is authorized and instructed upon the execution and delivery by the said Tacoma Light and

Water Company of a good and sufficient deed, with covenants of warranty to vest in said city a perfect title to said water works, electric-light plant and sources of supply, said deed to be approved
57 by the city council, to pay out of the money received for the sale of said bonds, to the said Tacoma Light and Water Company, the sum of one million seven hundred and fifty thousand dollars, the same to — accepted by said company in full payment therefor.

SEC. 7. That a special election be held in and for said city upon the eleventh day of April, A. D. 1893, for the purpose of submitting to the qualified voters thereof the question, whether said city shall purchase the water works and electric-light plant and the sources of supply owned by said Tacoma Light and Water Company, for the sum of one million seven hundred and fifty thousand dollars, and construct additions and extensions thereto at an estimated cost of four hundred thousand dollars; and whether said city shall borrow the sum of two million one hundred and fifty thousand dollars, to be used for the payment therefor, and issue its negotiable coupon bonds for said sum.

SEC. 8. The form of ballot to be used at said election shall be: "Shall the city of Tacoma purchase the water works and electric-light plant and sources of supply of the Tacoma Light and
58 Water Company for the sum of one million seven hundred and fifty thousand dollars; and construct extensions to said water works at an estimated cost of four hundred thousand dollars, and borrow the sum of two million one hundred and fifty thousand dollars, to be used for said purpose, and issue its negotiable bonds therefor?" All persons in favor of said proposition shall vote as follows: "For the purchase of the water works, electric-light plant and sources of supply of the Tacoma Light and Water Company, and the construction of extensions to said water works; and the issuing of negotiable coupon bonds of the city therefor." Those voting against said proposition shall vote as follows: "Against the purchase of the water works, electric-light plant and sources of supply of the Tacoma Light and Water Company and construction of extensions to said water works; and the issuing of the negotiable coupon bonds of the city therefor."

SEC. 9. Said election shall be held at such voting places in the several precincts of said city, and shall be conducted by such judges and inspectors of election as may be hereinafter designated
59 and appointed, and shall be conducted in all respects as provided by the charter of said city and the general laws of the State of Washington. The city clerk shall give at least thirty days' notice of the time, place and purpose of said election, and of the proposition to be submitted thereat, together with the form of ballot to be used; which notice shall be published in the city official newspaper for thirty days next preceding said election, and shall be posted for the like period at all of the places designated therein for holding said election.

SEC. 10. This ordinance shall immediately after its passage and approval by the mayor be published in the official newspaper of

said city for three days consecutively, and shall take effect upon the expiration of such publication.

Passed March 4, 1893.

HARRIS A. CORELL,
President of Council.

Attest: S. J. SMYTH, *City Clerk.*

Approved March 6, 1893.

H. S. HUSON, *Mayor.*

VI. That the city council and officers of said city now pro-
60 pose and intend to hold a special election at the time specified in said ordinance for the purposes therein specified, and in case said proposition shall be ratified thereat, to issue the negotiable coupon bonds of said city in the sum therein named, for the purpose of making said purchase and extension to the water works or plant of the defendant, The Tacoma Light and Water Company, specified in said ordinance, and to offer the same for sale.

VII. Plaintiff further shows that if such election be held, the expense thereof will exceed three thousand dollars.

VIII. Plaintiff further shows that in case said proposed purchase shall be ratified by the legal voters of said city, the bonds issued as proposed in said ordinance, said bonds, by reason of the doubts existing as to the legality and sufficiency of said ordinance, if the same can be negotiated at all, will not sell for what would be their full market value, and for which the same could readily be sold if there were no doubts as to the legal sufficiency of said ordi-
61 nance to authorize the issuance thereof, and the said city and the property-owners and tax-payers thereof, including this plaintiff, will be subject to great loss and injury, and large and wholly unnecessary taxation by reason of the doubts existing as to the sufficiency of said ordinance to authorize the issuance of said bonds.

IX. Plaintiff further shows that the indebtedness sought to be incurred under the ordinance therein set forth would exceed in amount more than one and one-half per cent. of the taxable property in said city as shown by the last assessment for city purposes, and would exceed, together with other existing indebtedness of said city, more than five per cent. of said assessment, but would not exceed five — cent. of said assessment together with all other indebtedness created for the purpose of supplying said city with water, lights and sewers, there being no other indebtedness outstanding which has been created for any of the purposes of water, lights and sewers.

62 X. Plaintiff further alleges that the said ordinance is wholly insufficient to authorize the holding of said election for the following reasons:

First. The act of the legislature of the State of Washington, approved March 26th, 1890, under which said proceedings have been and are now being taken, does not authorize cities and towns to purchase works of the kind described in said ordinance.

Second. Said ordinance does not specify or adopt the system or plan of either the said works or of the said electric-light plant proposed to be purchased.

Third. It does not specify or adopt the plan of the said proposed additions to or extensions of said water works.

Fourth. The ordinance does not provide that the question of the adoption of the system of water works and lighting plant and the question of the assent to the incurring of indebtedness shall
63 be submitted as two distinct propositions and that the voters be permitted to vote upon the said two questions separately.

Fifth. The said ordinance provides for the submission of the proposition therein contained, but does not, either by its terms or by the proposed form of ballot provide for the submission of the ordinance itself.

Wherefore, plaintiff prays the judgment of this court that the said ordinance be adjudged and declared to be wholly null and void. That the defendant, The City of Tacoma and Herbert S. Huson and S. J. Smyth, each and every one of the city council of said city, be enjoined and restrained from calling or holding said election, and from expending the funds of said city for the expenses thereof, and for such further and other relief as may be just and equitable.

ALFRED E. BUELL,
Plaintiff's Attorney.

STATE OF WASHINGTON, } ss:
County of Pierce, }

Alfred E. Buell being duly sworn, says that he is the attor-
64 ney of Edmund Seymour, the plaintiff in the above action, and that said Edmund Seymour is out of the county of Pierce and unable to verify the above complaint, and that he, Alfred E. Buell, has read the complaint, knows the contents thereof and believes the same to be true.

ALFRED E. BUELL.

Subscribed and sworn to before me this 7th day of March, 1893.

L. B. LOCKWOOD,
Notary Public in and for the State of Washington, Residing at Tacoma.

65 In the Superior Court of Pierce County, State of Washington.

EDMUND SEYMOUR, Plaintiff,
vs.
THE CITY OF TACOMA, HERBERT S. HUSON and S. J. SMYTH, and THE TACOMA LIGHT AND WATER COMPANY, Defendants.

Demurrer of the Defendant The City of Tacoma.

Now comes the defendant, The City of Tacoma, and for its separate demurrer to said complaint says:

The same does not state facts sufficient to constitute a cause of action against this defendant or to entitle plaintiff to the relief de-

manded, and particularly specifies the following grounds of demurrer:

1. It appears upon the face of said complaint that the city council of the city of Tacoma was authorized and empowered by the
66 statutes of said State and its charter to incur indebtedness for the purposes alleged in said complaint, and to an amount exceeding the sum named therein, and to issue its negotiable bonds therefor.

2. That the said ordinance upon its face appears to have been duly adopted by said city under and by virtue of the authority of an act of the legislature of said State, entitled: "An act authorizing cities and towns to construct internal improvements and to issue bonds to pay therefor and declaring an emergency," approved March 26th, 1890, as amended by an act approved March 19th, 1891; and that the said act so amended authorized the said city to adopt said ordinance according to the terms thereof and in case of its ratification upon the submission therein provided for, to issue its negotiable bonds for the purposes and to the amount therein stated.

(The other demurrers are in substance identical with this.)

67 In the Superior Court of Pierce County, State of Washington.

EDMUND SEYMOUR, Plaintiff,
vs.
THE CITY OF TACOMA, HERBERT S. HUSON and S. J. SMYTH, and THE TACOMA LIGHT AND WATER COMPANY, Defendants.

Judgment.

This cause came on to be heard on the 9th day of March, 1893, upon the demurrer of the defendants, The City of Tacoma, Herbert S. Huson and S. J. Smyth, appearing by their attorney, Frederick H. Murray; and the demurrer of the defendant, The Tacoma Light and Water Company, appearing by its attorney, Galusha Parsons, the plaintiff appearing by his attorney, Alfred E. Buell, and the court having duly considered the same,

It is ordered and adjudged, that the said demurrers, and
68 each of them, be sustained, to which ruling and decision the plaintiff, by his attorney, duly excepted, and the plaintiff having elected to stand upon his pleading,

It is further ordered and adjudged, that the said complaint be dismissed, and that the defendants recover of and from the plaintiff their costs and disbursements amounting to — dollars.

EMMETT N. PARKER, *Judge.*

69 In the Supreme Court of the State of Washington.

EDMUND SEYMOUR, Appellant,
vs.
THE CITY OF TACOMA *et al.*, Respondents.

Brief for Appellant.

Statement.

The defendant, The Tacoma Light and Water Company, under certain franchises granted to it by the city of Tacoma, is the present owner of the water works and electric-light plant supplying the city with light and water. It has offered to sell the same to the city a-
at price including both plants; the purchase to be of both or
70 neither. The city, by ordinance printed in full as a part of the complaint herein, has attempted to submit to the voters of the city the question whether the offer of the said company shall be accepted, the water works and lighting plant purchased at the price offered and an indebtedness to pay therefor incurred by the issuance and sale of bonds, and also whether the city shall extend the water works after the same are purchased, the estimated cost of which extension is declared in the ordinance, and incurr an indebtedness for such extension by the issuance and sale of bonds.

The ordinance provides that these several matters shall be submitted as one proposition for the ratification or rejection of the voters at a special election to be held on April 11th, 1893.

The indebtedness to be incurred under this ordinance is less than five per cent. of the assessment and more than one and one-half per cent., and would be, together with the existing indebtedness of the city, more than five per cent. No part of said existing in-
71 debtedness, however, has been incurred for water, lights, or sewers.

Appellant brought this action to restrain the holding of said election, and holds that it cannot properly be held for the following reasons:

1st. The action sought to be taken by the city is under authority of and in accordance with the provisions of the act relating to internal improvements in cities and towns, approved March 26th, 1890 (Wash. Laws, '89–'90, page 520), as amended March 9th, 1891, (Wash. Laws, 1891, page 326).

It is contended that this act in so far as it is a grant of power to "purchase" is void for the reason that the title of the act relates merely to "construction" and therefore is within the constitutional prohibition that the subject shall be expressed in the title.

2nd. The ordinance fails to specify the works and plant with sufficient detail to enable the tax-payers to determine, without
72 going to other sources of information, the expediency of purchasing the property offered and at the price named.

3rd. The act provides that the ratification of the system or plan

proposed and the assent to the incurring of indebtedness shall be submitted to the voters as separate questions.

4th. The ordinance provides by its terms that the proposition therein contained shall be submitted to the voters, while the act requires that the ordinance itself shall be submitted.

Argument.

1st. The Constitution (art. II, sec. 19) provides as follows: "No bill shall embrace more than one subject, and that shall be expressed in the title."

The title of the act of March 26th, 1890, is as follows: "An act authorizing cities and towns to construct internal improvements and to issue bonds to pay therefor, and declaring an emergency."

73 "Construction" and "purchase" are two distinct things. They are so recognized to be distinct in section 1 of the act. The power to construct is not the power to purchase, and *vice versa*. Since the title of this act is silent upon the question of "purchase," any power of purchase sought to be conferred by it is void under the constitutional provision. The scope of the act is limited by the title, and the title speaks of construction merely.

2d. Section 1 of the act is a grant of power. Section 2 provides the method by which that power shall be exercised. The language is:

SEC. 2. Whenever the city council or board of trustees of any such city or town, of which they are such officers, shall exercise the authority hereby conferred upon them in relation to water works, sewerage or works for lighting purpose, any or all thereof, the corporation shall provide therefor by ordinance, which shall specify and adopt the system or plan proposed," etc.

74 This court in Metcalfe *vs.* Seattle, 1 Wash. St. 297, has construed this clause. In that case, on page 300, of the opinion it is said: "Clearly the intention was that whereas such works are likely to demand large and unusual expenditures, the wisdom of which in some cases may be doubtful, the people who would have to furnish the means should be fully apprised of the whole scheme, and there should be a definite, well-considered and practicable scheme presented for their rejection or adoption."

It is contended by appellant that the act as thus construed means that the tax-payers and voters should be put in possession of such information that, without going to other sources than the ordinance, they would be able intelligently to determine their choice.

It is not contended that, in the case of construction, the specifications as demanded by a contractor, or in case of purchase the detailed and itemized schedule, as required for a deed or bill of sale, should be set forth in the ordinance, but that the works to

75 be constructed or purchased should be set forth with that same degree of particularity and detail as would be demanded by a private person who was considering the advisability of purchasing or of advancing money on a construction loan. Such a

private person considering the advisability of purchasing a system of water works, would desire to know the extent of territory covered, the miles of pipe laid and of what sizes, the sources of water supply and the extent of the rights of the seller therein, the quantity of water available and how brought to the city, and if in an aqueduct or flume, of what capacity, the capacity of the pumping stations and their character, the amount of land and where situate; in short, such a prospective purchaser would demand a summary showing the extent and character of the property offered.

Such a summary the voters and tax-payers are entitled to have before the question of purchase or construction is submitted, and without which they vote in the dark.

To the argument that while in matters of construction the
76 ordinance should set forth the character and extent of the system or plan proposed in a "definite, well-considered and practical" shape for consideration, yet in the case of a purchase this is not necessary for the reason that a thing to be purchased being a thing in existence, its designation by name is sufficient description, there are three objections, each of which is fatal.

A. The first section of the act grants the power to purchase, if at all, as well as to construct, and the second section points out the manner in which the power to purchase or to construct must be exercised. The language of the second section is: "Whenever the city council * * * shall deem it advisable that the city * * * shall exercise the authority hereby conferred * * * the corporation shall provide therefor by ordinance which shall specify and adopt the system or plan proposed, etc."

The legislature has made no distinction between the manner to be pursued in construction and the manner to be pursued in
77 purchase. If the city when constructing water works must particularize in an ordinance the works to be constructed for the reason that the act so provides, then in purchasing water works it must also particularize for the reason that the provisions in regard to purchase and construction are identical. The legislative mandate is conclusive. The argument that purchase is different from construction and therefore the power of purchase demands a different manner of exercise from the power to construct, should be addressed to the legislature and not to this court.

B. If the manner of procedure marked out by section two cannot be followed out in a case of purchase, then the very grant fails, for the "mode of the exercise is the measure of the power." But this manner of procedure can be followed. It is as easy to specify and schedule water works or lighting plant to be bought as to specify and schedule the same to be constructed, and the requirement of declaring the estimated cost is as applicable in the one case as in
78 the other. The council has no power to bind itself until the voters have given the authority, and therefore has no power to bind the seller. The price is fixed when the contract is made, and until the contract is made all the council can do is to state at what price it thinks it can buy—to "declare the estimated cost."

C. The reason of the requirement that the ordinance should con-

tain sufficient information to enable the voter to determine his choice, to apprise him of facts sufficient to enable him to judge of the wisdom of the proposed scheme, applies equally to a purchase as to a construction. The voter in a municip-lity, especially in a large city, ordinarily does not, and without special investigation cannot know those facts which are vital to an intelligent determination of the wisdom of purchasing water works at a declared cost.

The rights of the seller in the sources of supply, whether vested or by mere license, and their extent; the amount of flow available for future increase; the character and extent of the distribut-
79 ing system, etc.—these facts require special investigation for their ascertainment and are not patent to ordinary observation. How can the voter in any city in this State, until such facts are placed before him, determine whether a proposed purchase at a declared cost is wise or not.

3d. It is contended for appellant that the act under which the proposed election is to be held requires that two distinct propositions should be embodied in the ordinance and that each voter is entitled to a separate vote upon the two questions. The two questions are, first, whether the system or plan proposed shall be ratified or rejected; second, whether there shall be assent to or dissent from the incurring of indebtedness.

The language of the second section of the act as it stands since the amendment of March 9th, 1891, (Wash. Law, 1891, page 326), would seem to require this separation. Otherwise the provision that the adoption of the system or plan may be had by a majority, while the indebtedness must be assented to by three-fifths
80 of the voters would be nugatory. That the legislature meant to separate the two propositions and to provide for their submission separately is clear from the history of this act.

The act was originally passed at the legislative session of 1890–'91, and was approved March 26, 1890 (Wash. Laws 1891, page 520). On August 8th, 1890, this court decided—

Metcalfe *vs.* Seattle, 1 Wash. St. 297.

In that case it was held construing the second section of the act as it then stood, that the proposition, if it contemplated the adoption of a system or plan to be acquired out of current revenue, might be carried by a majority vote, but if in addition it contemplated incurring an indebtedness, the vote in its favor must be three-fifths, and that the amount so to be incurred might reach any sum, provided the total indebtedness did not exceed ten per cent. of the assessment.

The act as thus construed provided for one proposition, the
81 vote required to carry it depending on whether it contemplated indebtedness, and giving municipalities the power to create indebtedness up to the constitutional limit.

This being the state of the matter the legislature, at the session of 1891, amended this second section.

As it stood before the amendment it read, beginning with the

proviso, which is the part amended, as follows: (The words itali-zed are the words changed.)

Provided, That if the said city or town is to become indebted or issue bonds for said water works or sewerage system or plant or works for lighting purposes, the said proposition and authority to become so indebted shall be adopted and assented to by three-fifths of the qualified voters of said city or town voting at said election, *otherwise by a majority vote, and when so adopted and assented to as aforesaid the said corporation shall become authorized to become indebted and issue bonds as hereinafter provided, subject however to the condition that the total indebtedness shall not exceed ten per centum of the taxable property shown in the last assessment-roll.*

After the amendment the proviso read as follows (the words itali-zed being the new words inserted):

82 Provided, That if the said city or town is to become indebted or issue bonds for such water works or sewerage system or plant or works for lighting purposes, the said proposition and authority to become so indebted shall be adopted and assented to by three-fifths of the qualified voters of said city or town voting at said election, *except as to the adoption or rejection of the system or plan of internal improvements contemplated, which may be adopted by a majority vote. When the system or plan has been adopted, and the creation of an indebtedness assented to as aforesaid, the said corporation shall be authorized and empowered to construct and acquire the internal improvements contemplated, and to create an indebtedness and to issue bonds therefor as hereinafter provided, which said indebtedness and bonds shall not exceed five (5) per cent. of the taxable property as shown on the last assessment-roll of the city or town made for general municipal purposes; such indebtedness and bonds to be additional to all other outstanding indebtedness of the city or town created within the constitutional limits.*

The amendment in reference to the amount of indebtedness was plainly responsive to the ruling in the Metcalfe case that the original act allowed an indebtedness of more than five per cent. of the assessment to be created, which was one of the questions mooted in that case. This result was reached by changing the last clause in the proviso, and did not necessitate the other changes. As has been said, the Metcalfe case held that one proposition should be submitted requiring a mere majority without indebtedness and a three-fifths vote with indebtedness.

83 Plainly the amendment, to which some effect must be given, changed this rule. The care with which the act now separates the question of the ratification or rejection of the system or plan proposed from the question of the assent to or dissent from the creation of the indebtedness, and provides a distinct rule for each to determine if either is carried, shows conclusively that the legislature meant that two questions, and not a single one, should be submitted. Any other construction leaves the matter just where it was before the amendment and nullifies the action of the legislature. There is no other construction possible. If a single proposition is submitted it must carry or fail of carriage as a single propo-

sition, and if this proposition requires the creation of indebtedness it must receive three-fifths of the votes cast. This is the rule in the Metcalfe case which the legislature has carefully changed.

To the contention that in a case of a purchase to vote for the adoption of the system or plan proposed to be purchased, without providing the means to pay, would be a vain thing, the an-
84 swer is that the voters might be willing to purchase the plant or works offered, but not upon the terms proposed. The same thing applies to construction. The voters might be willing to adopt the system proposed, but consider either that the estimated cost was excessive or that the work should be done by current revenue.

4th. It is contended for appellant that the act requires that the ordinance should be submitted. The language is "The corporation shall provide therefore by ordinance which shall specify and adopt the system or plan proposed and declare the estimated cost thereof as near as may be, and the *same* shall be submitted for ratification or rejection." The word itali-zed here seems from the context to refer to "ordinance." It is not contended that the voters must vote a ballot "for or against ordinance No. —," but it is urged that since the ordinance must contain the very propositions to be voted on, and the ballots must be for or against the propositions as they are contained in the ordinance, the election notice should con-
85 tain the ordinance in its own terms in order that the voters may be apprise l of the exact propositions upon which to vote. The election notice is the source of information to the people, and this notice ought to set forth the ordinance in full and not the propositions which the city clerk may think are therein contained.

It is respectfully submitted that the judgment in this case ought to be reversed and the case sent back with instructions to grant the injunction asked for in the complaint.

ALFRED E. BUELL,
Attorney for Appellant.

86 *Brief for Respondents.*

First.

Has the city of Tacoma the legal power to purchase works of the kind described in this complaint?

That it has, and has had at all times since its incorporation as a city, we think there is not the slightest ground for a difference of opinion, first, as one of the implied powers—duties—incident to every municipal corporation; second, by the express terms of all its charters from the first organization of the city of Tacoma—Old Tacoma—to this time; third, and we suppose this of itself sufficient, because this court, in Yessler against the city of Seattle, so decided under a charter in this respect word for word the same as that of the city of Tacoma.

The references which follow we think wholly unnecessary,
87 so far as this immediate question is concerned, but they may have some possible bearing upon the construction of other provisions of the act, of which it is the principal purpose of this suit to obtain an authoritative construction, namely, the act of March 26, 1890, entitled, "An act authorizing cities and towns to construct internal improvements and to issue bonds to pay therefor.

1. The act for the incorporation of the city of Tacoma.

It contains this provision:

Laws 1875, page 178.

The trustees shall have power to construct pumps, aqueducts, reservoirs or other works necessary for duly supplying said city with water.

2. The act for the incorporation of the city of New Tacoma, Laws of 1881, page 86.

It provides that:

The city of Tacoma may purchase, hold and receive property, both real and personal, within the city for public buildings, public works and city improvements and may hold and receive
88 property, both real and personal, beyond the limits of the city to be used for the erection of water works to supply the city with water, and may control, lease, sell or dispose of the same for the benefit of the city.

3. An act to consolidate the cities of Tacoma and New Tacoma, under the name of Tacoma, Laws 1883, page 310.

Section 1 is identical with that just quoted. Section 4 is as follows: To provide for the lighting of streets and furnishing the city with gas or lights and for the erection and construction of such works as may be necessary and convenient therefor.

SECTION 10. To erect and maintain water works within or without the city or to authorize the erection of the same for the purpose of furnishing the city with a sufficient supply of water, but no such water works shall be erected by the city until a majority of the voters of the city at a general or special election assent thereto.

Under the authority so conferred, the city by several ordinances granted to the defendant, The Tacoma Light and Water Company, the right to construct and maintain light and water plants, in terms providing that the rights should be assignable.

89 4. By an act of the legislature approved February 4th, 1886, entitled "An act to incorporate the city of Tacoma, and defining the powers thereof,"

SEC. 1. It shall have power to erect water works and supply the city with water.

SECTION 48, paragraph 5. It shall have power to purchase or condemn and enter upon and take any lands, water works or gas works within the corporate limits for public use.

Paragraph 6. To provide for the lighting of streets and furnishing the city with gas or lights, and for the erection and construction of such works as may be necessary or convenient therefor.

Paragraph 7. To erect and maintain water works within or without the city or to authorize the erection of the same for the purpose of furnishing the city with sufficient supply of water.

This charter was in force at the time of the admission of the State. After the admission of the State under the power assumed to be conferred by section 10 of article XI of the constitution, and the act of the legislature relating to cities of twenty thousand inhabitants and upwards, the city adopted its present charter. The act referred to, contains the following provisions:

90 SECTION 5, paragraph 1. Any city shall have power to acquire, by purchase or otherwise, such lands and other property as may be necessary for any of the corporate uses provided for by its charter.

Paragraph 6. To purchase or appropriate property within or without its corporate limits upon making just compensation.

Paragraph 14. To provide for erecting, purchasing or otherwise acquiring water works within or without the corporate limits of said city to supply said city and its inhabitants with water, or to authorize the construction of the same by others, when deemad for the best interest of said city and its inhabitants, and to regulate and control the use of the water so supplied.

Paragraph 15. To provide for lighting the streets and all public places and for furnishing the inhabitants thereof with gas or other lights, and to erect or otherwise acquire and to maintain the same, or to authorize the erection and maintenance of said works, as may be necessary or convenient therefor, and to regulate and control the use thereof.

Under this act the city adopted its present charter, which contains the following provisions:

SECTION 52, paragraph 4. The city shall have power to borrow money for corporate purposes on the credit of the corporation and to issue negotiable bonds therefor on such conditions and in such manner as prescribed in this chapter.

Paragraph 45. To fix the price of water and light furnished to inhabitants of the city by any person or corporation other than the city, and to regulate the supply and use thereof, whether by persons or corporations now holding franchises or hereinafter obtaining franchises.

SEC. 90. The city may borrow money to be used for strictly municipal purposes, and may incur indebtedness in other ways
91 for said purposes, but it shall not for any purpose become indebted in manner to an amount exceeding one and one-half per centum of the taxable property in the city, without the assent of three-fifths of the voters in the city voting at an election to be held for that purpose, nor in cases requiring such assent shall the total indebtedness of the city at any time exceed five per centum on the value of the taxable property in the city, to be ascertained by the last assessment made for city purposes, provided, that the city with such assent, may become indebted in a large amount not exceeding five per centum additional, for the purpose of supplying the city and its inhabitants with water, artificial light and sewers,

when the works for supplying such water, light and sewers are owned and controlled by the city.

SEC. 91. To secure any existing indebtedness of the city, or indebtedness about to be incurred, the city may, by ordinance, authorize the issuance of the bonds of the city therefor, and pledge the faith and property of the city for the payment of such bonds, and direct the time and manner of the payment of both principal and interest thereof, and may from time to time authorize the refunding of any indebtedness of the city. No bonds shall be sold until they have been advertised for sale at least thirty days preceding the day of sale, nor shall any bonds of the city be sold for less than par and accrued interest, or for a longer time than twenty years.

SEC. 203. The city shall have the right to condemn and appropriate any water works, gas works, electric plant, street railway, for the purpose of operating, managing and controlling the same by the city, and all such appropriations shall be made as provided in this article, except that before passing the resolution provided for, the city council shall first submit to the qualified electors of the city the proposition to appropriate or condemn said property, and if a majority of votes cast be in favor of appropriation and not otherwise, such resolution shall be passed and such proceedings taken, said vote to be taken at a general or special election.

92

SEC. 218. When water is supplied by any person or corporation to said city or to any department, it shall not be paid for at more than the rate established by the city council.

If the law ended here and this court had decided nothing upon the subject, we think it would be too plain to admit of argument, that the city would have the exact power to its full extent which is now attempted to be exercised. The power is given by both the constitution and the act; the method of its exercise is provided by its charter under the constitution.

5. At the same session and, of course, before the adoption of its present charter, the legislature passed an act empowering cities and towns organized prior to the State constitution to extend their credit. Laws, page 225.

This court—Metcalfe against Seattle—has construed this act too, and held that it was not repealed by the later act—March 26—of the same session. If both were out of existence it is the opinion of the writer that the authority would be ample for the city to do precisely what it is now seeking to do and in the way now attempted.

93

I think it of some importance to bear in mind that both of these acts were passed before the adoption of the present charter of the city of Tacoma, and before the time had arrived when any city of this class could adopt a charter under the provisions of section 10 of article XI of the constitution. The act in reference to this class of cities was not passed until after the approval of the first of these acts, February 25, and was approved only two days before the passage of the last. Manifestly these acts were both passed to supply what the legislature thought to be a then present necessity; both contain emergency clauses; all of the cities of the State were then

acting under their old charters, the general municipal incorporation act of that session not having then been passed, it was approved March 27.

94 Under their territorial charters some of the cities of the State may have had these powers others may not, hence these acts, which so far certainly as cities of the first class are concerned, had they then possessed their present charter powers, would have been unnecessary.

In my judgment the constitution did not of its own force empower the inhabitants of any of the municipal corporations of the State to vote themselves into an independent government with just such powers as they saw proper to assert, the legislature had first to act, which it did by the passage of an enabling act. I understand that to be the opinion of this court, in Metcalf against Seattle; while I think the power too clear to admit of argument, I think the construction of the details, of the *modus*, provided by these acts, and especially when compared with the charter provisions of any particular city, may be to a degree, a considerable degree, influenced by the time when the acts were passed and the condition of things then existing.

95 Another thought worthy of consideration I think is that these acts are general—in fact there were no classes at that time—applying to all of the municipal corporations of the State, which would certainly imply that they should receive no strained construction with a view to limiting the power of a class of municipalities provided for by the constitution and by it authorized to frame—subject, of course, to the general laws of the State—charters for themselves. All of which is said not because in my judgment there is any question as to the power to purchase, and to issue bonds, but as bearing upon the question as to the exercise of the power, the time and the how, in case of conflict between the charter of the particular municipality and these—the last two I mean—general acts. I feel bound to say something about these matters, because they are not only matters of public interest, but of public comment, although my own judgment, is that there is in fact no reasonable ground for argument. Two things growing out of all this

96 legislation have been very generally and very earnestly talked about; first, that we have nothing to do with any of the former charters of the city of Tacoma, either as a source of power or for any other purpose, as in the language of the constitution, they are all superseded by its present charter; and second, that the powers which it may exercise under its present charter, whether particularly specified in the enabling act or not, are to be controlled by the particular act—March 26—named here, that that act is the only source of power as to the subjects mentioned in it, and that the mode of exercise there prescribed is exclusive of all others. It is further said that all that is said in section one of that act as to the purchase of works of this kind should be rejected because its title refers only to construction. This court held in the Seattle cases as to both of these questions directly the reverse, first that it was proper to look into the former charters of the city to see what powers it

always had had, and second that this particular act did
97 authorize the purchase of works of the kind named. It was upon that construction that the bonds of the city of Seattle found purchasers. But it is said the attention of the court was not called to the title of the act in that particular. It is the opinion of the writer that we need not go to that act at all for power, but if we do that the body of the act and what it contains as to purchase is not only germane to, but is in fact but one way of doing what the title of the act indicates was its purpose, namely, of supplying the city with works of the kind mentioned. The details for carrying out the purpose, whether by purchase or construction, might be, and as I shall submit under the next head of this argument, in my judgment would be in some respects different. In brief—

1. The power is implied as to all municipalities.

2. The city of Tacoma has always had the power by the express provisions of all of its successive charters.

3. It was provided for by the constitution.

98 4. It is in terms conferred by the enabling act.

5. The act of February 26 would be sufficient, if standing alone.

6. It is provided for by its present charter.

7. This court has so decided.

Opposed to all which it is said, as already stated that the provisions contained in the first section of the act of March 26, are void, and the act to that extent unconstitutional, because the word purchase is not contained in the title.

I feel that I have argued this question altogether out of proportion to its necessities; but if these proceedings at all come within this act, a copy of the act must be printed upon the bonds, and they will be put upon the market with such a doubt as its title standing alone might create in the mind of a person having no other knowledge as to the authority for their issue. It goes without saying that they would be offered for sale at a disadvantage.

99 Second.

Assuming the existence of the power, is this ordinance properly framed to authorize its exercise?

1. Could it be done by any form of ordinance, or by any mode of proceeding, without the act of March 26?

If the city had the power, I suppose it would necessarily follow that there would be some way in which it could exercise it upon the familiar principle that a grant of power implies the necessary—the ordinary and usual—means for its exercise, subject only to such limitations as may be found in the constitution or contained in the act conferring the power. As in this instance, the amount of the indebtedness sought to be incurred exceeds one and a half per cent. of the city assessment by the terms of the constitution it must be submitted to vote, subject to the assent of three-fifths of the voters

voting at an election to be held for that purpose. This is as
100 far as the constitution goes. This court said, in Metcalfe against Seattle, that this was not a grant of power; that it was only a limitation as to its exercise and the limits beyond which it could not go, that the rest was for the legislature. All the acts relating to the subject, passed by that legislature, were pending at the same time. They were passed in the following order:

The act authorizing cities to extend their credit, February 26.

The act providing for the government of cities of twenty thousand, March 24.

The last, two days after.

Suppose this act had not been passed at all. The constitution provided for conferring the power, the legislature conferred the power, and by the same act authorized the city of Tacoma, and all others of its class, to provide for their own government, specially giving this power in both its branches, to construct or purchase, this kind of works, and to pay for them by issuing its negotiable
101 bonds. In addition to this (section seven) they were clothed with all other powers which were then possessed by, or which should be thereafter conferred upon incorporated towns and cities in this State, and all other such powers as are usually exercised by municipal corporations of like character and degree. If this does not include every kind of local municipal power it would probably be impossible to use language that would. The charter adopted in pursuance of this authority provides to the minutest details for doing just what the city is now attempting to do, and for the manner of doing it. Its provisions as to the power itself were quoted under the former head of this argument. Those providing for the manner of its exercise when the amount exceeds one and a half per cent. of its assessment are as follows:

1. All legislative acts must be by ordinance. Sec. 45.

2. No ordinance obligating the city for the payment of
102 more than one thousand dollars shall be passed before the second regular meeting of the council. Every ordinance must be published three days and shall not take effect until published. Sec. 47.

3. The mayor, controller, treasurer and president of the council shall constitute a sinking fund commission, who shall negotiate the sale of all bonds issued by the city. Sec. 82, 84.

4. Section ninety already printed in full provides for the submission of the question of incurring indebtedness, with a special provision for water and light.

Upon the subject of elections, the charter contains the following provisions: Section 52, paragraph 1 says: The city government shall by ordinance provide for general and special elections.

SEC. 27. A special election may be ordered by the council at any time, and held in the several polling precincts of the city, by giving 10 days' notice thereof, in one or more daily newspapers published in the city, and such election shall be conducted and the re-
103 turns thereof canvassed in like manner as general municipal elections in the city.

SEC. 12. The city clerk by order of the city council, shall give 10 days' notice by publication in one or more daily newspapers published in the city of any municipal election, the officers to be elected, questions or measures to be voted upon, the place designated in the various precincts for holding the election, and the inspector and judges appointed to hold the same.

Upon the subject of registration it contains these provisions:

SEC. 9. The registration of voters for general or special elections shall be as provided by the general laws of the State of Washington.

SEC. 13. No person shall be entitled to vote at any municipal election who is not a qualified elector according to the laws of the State of Washington, and who shall not have entered his name on the city register for the ward and precinct in which he resides, as provided by law.

Follow the usual provisions for canvassing and declaring the result.

We submit that it was competent for the city to do what is here provided for; that these provisions contain all of the machinery necessary for carrying into effect the purpose now proposed, and that unless they are nullified by some one or all of the statutes in
104 question they are sufficient for the present purpose. The suggestion is that the act of March 26 contains other requirements, and that they must be complied with, whatever the charter may say upon the subject. In the preparation of this ordinance it was the purpose to comply with this law, although with the belief that the proceedings would be sufficient under the charter, even if this act by reason of its title should not be held to authorize a purchase. No question arises upon any portion of the act, except section 2 as amended March 9, 1891. Laws, page 326.

The questions made are:

1. Whether this act, by reason of the supposed insufficiency of the title, applies at all to what the city is now attempting to do.

If it does not we say, first, that the authority contained in the other statutes referred to, and the city charter is abundantly sufficient, and we are well enough without the act; second, that this
105 court in the Seattle cases held that it does apply, that it does contain the power to purchase.

2. Whether its requirements as to proposed plans and systems and estimated cost have any application when the purpose is to purchase an already constructed plant, not at an estimated cost but for an agreed price.

We say, first, that this language is wholly inappropriate to the purchase of an established plant, but to avoid as nearly as we could the consequences of a possible mistake in this respect we tried to conform to the act by setting out as fully as would be at all consistent with an ordinance, unless the purpose was confusion instead of information, what the plan, the plant was, which it was proposed to purchase, and fully the proposed extension.

3. It is claimed that the ordinance *in extenso* ought to be submitted.

We understand that it is the proposition that is to be as-
106 sented to, that the form of the submission should be such that the ordinary voter can understand what he is to vote upon without an attempt to master the details of an ordinance.

4. The amount of the proposed indebted- is clearly within the constitutional and statutory limits.

5. A question arose as to the notice. The charter requires at least ten days. This act requires thirty. To be safe we have adopted the latter.

Third.

It has been suggested that there is some question as the regular municipal election takes place upon the fourth of April, and the special election called by this ordinance upon the eleventh, whether it is possible to comply with the registration laws, and the further question whether these laws apply to anything but the election of officers.

Registration, Laws 1890, page 445.

107 We say:

1. The registration act, by its terms, applies only to elections for the choice of officers. Sec. 17.

2. That it is possible to comply with this law, according to its true construction, and that it is the purpose to do so.

Section 6 provides for closing the registration books ten days preceding any election, which can only be done upon five days' previous notice. This implies, of course, that the necessity for closing them must be known by the proper officers at least fifteen days before the election. By the city charter a special election need be but ten days after it is called, that is, five days after the expiration of the notice of closing the registration books. The city of Tacoma is not peculiar in this respect. We submit, first, that the words of this section, as to closing the books, taken in connection with the words of the first sec-
tion, all general municipal elections, reasonably imply that
108 the election spoken of is a general election provided by law as distinguished from special elections called by any board of public officers, and which take place only as called; second, that the purpose of closing the books is to enable the election officers to organize for an election that is to take place ten days after, and the spirit of the act being that every elector shall have an opportunity at all times during the year to register, except when the books are necessarily required for preparation for an election to take place ten days after they are closed, that they can at all times be properly kept open for all other purposes than that of registering for that election.

In this case—if the registration law applies to a special election for such a purpose as this—either the books must be closed for a continuous period of seventeen days before the special election, or they may be closed at one time for the general election, and at another for the special election.

109 Again, doubtless there will be some persons, qualified electors, who by reason of the want of sufficient time of residence, who are not qualified to vote at the election to be held upon the

fourth, who would be qualified to vote at an election to be held upon the eleventh, if not deprived of an opportunity to register. Is it consistent with the spirit of our laws relating to the right of suffrage to deprive one so situated of the enjoyment by construction unless the construction is so palpably demanded that there is no avoiding it?

The city council are by law, they being the sole judges, subject only to the condition that the time should not be less than ten days, authorized to fix the time when the election should be held, the question can be submitted only at a special election. Coming as these elections do, if both are to be held, the choice is between two alternatives, either to close the registration for seventeen days or to close them for one election ten days before it takes place, and for the other ten days before it takes place. For my part I can-
110 not see that there is any question of doubtful construction about it. If there were it should not be turned against the elector by any considerations of mere inconvenience or trifling expenditure. But I do not look upon the language as at all mandatory. Suppose the books were kept until the day of election, the officers not requiring them for preparation. If none but qualified electors vote, can there be any question about it, that the election would be sustained? The books are full of cases in which the courts have upheld elections where there were irregularities altogether more manifest than that which this question assumes. To deprive a citizen of the right of suffrage secured to him by the Constitution is, under any circumstances, the exercise of a very questionable power. For ten days at a time the books may be closed against him. If this election was lawfully called, it certainly cannot be unlawful to allow every elector otherwise qualified under the constitution an opportunity to qualify himself by placing his name upon the registration books.

111 I have discussed this question because it has been raised upon the streets, and if this ordinance is otherwise it is possible that a doubt has been cast upon it which would have an effect upon the vote upon it. It is not raised in the complaint, and only appears to exist by reference to the city charter as to the time fixed for the annual election.

For my own part, I do not see that there is the slightest difficulty in following the registration laws according to their terms. But if there were, two or three well-recognized legal principles would settle any doubt that there might be about it in favor of the validity of this ordinance and the legality of the proposed election. Among these principles are that statutes as to times and modes of procedure by public officers are generally regarded as directory instead of mandatory, and that their proceedings will be sustained unless the complaining party shows special prejudice. Another is, and the books upon this subject are filled with decisions and illustrations,
112 that all election laws will be construed with the utmost liberality to secure to the elector the enjoyment of the right of suffrage. Chapters might be filled with instances of manifest irregularities upon the part of the election officers such as their fail-

ure to be sworn, to appear at the time provided by law, the hour of opening the polls, closing the polls before the time appointed, their failure to keep the ballot-boxes as required, of which one instance to be found in the books is the use of a gourd tied up in a pocket handkerchief, carried home by one of the judges and kept over night under his bed.

Brightly on Election Cases, 448, says: That a mere irregularity on the part of the election officers, or their omission to observe some merely directory provision of the law, will not vitiate the poll, is a point sustained by the whole current of authorities. Farther on he says: The forms which must be observed are those which affect the merits. The will of the majority is to be respected, even when irregularly expressed. The mere negligence to perform the directory re-
113 quirements of the election laws or the performance of their duties by the officers in a mistaken manner ought not to be allowed to defeat the expression of the will of the people. That the election was not held at the place required by law but in the neighborhood, has been held not to be an material irregularity, unless it was shown that it affected the result. The same has been decided as to registration, and even as to the wilfull misconduct of the election officers. The same, where one of the clerks of the election was intoxicated while discharging his duty. The same where a stranger without being sworn took the place of the proper clerk. Quotations of this kind might be made by the chapter. That there were no registration poll-lists at all was held in Taylor *vs.* Taylor, 10 Minn 187, would not defeat the validity of the election.

In People *vs.* Cook, 4 Selden 67, the court said: "The errors or irregularities which warrant rejecting the polls are such as operate to deprive lawful electors applying to vote of their privilege,
114 or to receive polls not entitled to vote." There were many manifest irregularities in that case.

In People *vs.* Wilson, 62 N. Y., the court said: The provisions as to the formal organization of the board of registry and as to the certification of the registers, are directory merely, not jurisdictional, and the omission of the inspectors to observe them does not so invalidate their proceedings as to render all votes cast in the district illegal and void. That the right to vote does not depend upon the observance by the inspectors of all the minute directions in respect to the manner of holding the elections. That the election laws should not be so construed as to deprive citizens of the most important of their rights without an opportunity to be heard. Many irregularities are mentioned in this opinion, but the court held that they should not be allowed to at all effect the validity of the election.

There was a very full discussion of the question as to what
115 irregularities, if any, would effect the validity of an election in Wood *vs.* Baker, 38 Wis. 71. In the course of the opinion the court said: The registry laws are designed for the protection of the constitutional right of suffrage, and not to defeat that right where the elector is himself without fault; they are safeguards, not traps. It would be a fraud upon the elector to hold him disfran-

chised without notice or fault; that the right to vote is a constitutional right of which no statute could strip the elector without some voluntary failure on his part; that it would be monstrous to give such an effect to the registry law against its spirit and in violation of the letter and spirit of the constitution. Every court and all of the authorities have recognized that all statutes relating to the duties of election officers should be construed with the utmost liberality to protect the right of suffrage, and to enable the people—some of them say, the plain, common people—to conduct their elections not only with safety but with economy; and it is generally if
116 not universally held that a failure by the election officers to observe in form and terms the requirements of the statutes should under no circumstances be allowed to affect the validity of the election so long as the result is without prejudice. Some of the decisions were made under statutes which in terms declared that a failure to observe their specified requirements should render the election void. The courts, even in such cases, holding there was and should be a distinction between such requirements as could be fairly construed as directory and those which must be held mandatory. The decisions under the registration laws are not very numerous. It is well known that in some States they have been held absolutely void, as imposing conditions not required by the constitution. Of course such decisions can have no application in this State, as the constitution itself provides for registration, but they serve to illustrate the strictness with which all laws should be construed as against defeating the right of suffrage.

In Stevens *vs.* Mayor of Albany, 11 S. E. R. 150, it was
117 held that a statute which provided for registration for the election of municipal officers had no application to a special election for voting upon the question of bonding the city for the erection of water works. Our statute by its terms applies to public officers, but does not negatively say that it will not apply to anything else, neither did that statute.

In People *vs.* Ohio Grove Town, 51 Ill., it was held that the registry laws of that State did not apply to an election for the submission of the question whether the town should subscribe for stock in a railroad company.

The subject of irregularities in the conduct of elections is discussed in McCrary on Elections, section 182, and the following. What is there said is in entire accordance with what I am now saying. As to the construction generally of statutes prescribing the duties of public officers, Endlich on the Interpretation of Statutes lays down the rule that the mode of proceeding is in general
118 deemed advisory and a strict compliance is not indispensible to the validity of the proceedings. Section 436 and the following. He especially mentions statutes relating to elections as coming within the rule. In section 438 numerous instances are cited, some of which might much more readily be thought fatal to the validity of the election than the difficulty now suggested.

Sutherland on Statutory Construction, page 383, cities numerous instances of a failure to observe the election laws according to their

terms. One is the failure of the officers to be sworn, another that the clerk failed to give the prescribed notice, another that the poll books were not transmitted to the clerk through the election officer, saying as to all of these—Statutes concerning the manner of conducting elections are directory unless the non-compliance is expressly declared to be fatal to the validity of the election, or will change or make doubtful the result.

119 About the only discussion I have found in any of the text books relating particularly to the defective discharge of their duties by officers acting under the resgistration laws is in Mechem's Public Officers, beginning at section 156. The results which he reaches are quite as favorable as I could desire.

I have discussed this subject at this length and referred to authorities, not because there was in my judgment any serious doubt about the regularity of the proposed election in this respect. Something has been said that it would be necessary to open another set of registration books. For my own part, I do not think it would be necessary. The books do not at any time pass out of the hands of the clerk. What the word organization may mean as used in the statutes, I do not know, but the only organization with which the clerk has anything to do is to copy the books. The registry law says he shall furnish copies for the use of the judges of election. The course I am about to suggest it seems to me is entirely consistent, not only with what may be considered the substantial requirements

120 of the statute, but with its exact letter. When the *the* books are closed for the annual election, he will copy them to that point for the use of the election officers at that election, all of the time keeping them open for the uses of the special election precisely as if there were no intervening election, and when the time comes, if the case as to that comes at all within the statute, complete the copies down to the time for closing the books for the election, and then furnish those copies to the same officers for their use at that election.

My apology for protracting this discussion to this length is, first, the importance of being right, and second, if I may be allowed to mention it, the fact that some of these questions have been very vigorously discussed elsewhere. I have felt, as every one must, that if the proposed bonds are to be issued, they should be put upon the market in the best possible form and without anything that

121 the most ingenious, the most cautious, of bond-purchasers or counsel could suggest to their discredit.

GALUSHA PARSONS,
Attorney for Respondent The Tacoma Light and Water Company.

F. H. MURRAY,
Attorney for Respondents The City of Tacoma, Herbert S. Huson, and S. J. Smyth.

122 We will say further in this connection that we are informed by counsel who argued the case before the supreme court in the case of Seymour *vs.* The City of Tacoma, which case

was tried prior to this celebrated water election, that the constitution was never even discussed before this honorable court.

3. In the decision rendered in this cause the court apparently declines to take up the question of limitation of indebtedness at the time these seventeen hundred and fifty bonds were issued. Why it so declines counsel for appellant cannot understand. The language of the decision says something about this question having been passed upon heretofore in the second case of Seymour *vs.* The City of Tacoma; that the questions involved in that case were not the questions involved in this case, and that the question involved in this case, being the question of additional outstanding indebtedness for bonds for sewers in the city of Tacoma at and prior to the time of issuing the light and water bonds, never has been before this court, as far as counsel for appellant are able to ascertain, and surely nothing in the record of the course of proceedings in any of these cases show that such question was ever before this court. In the second of these Seymour cases, which is referred to by the decision of this court in this cause, it was decided that a certain amount of bonds, either for light, water, or sewers or all three, so that they did not aggregate $2,080,000, might be issued, not taking into consideration the fact that there was still an outstanding indebtedness belonging to this class of $21,000, which fact was not disclosed in the second Seymour case, which has never been before this
123 court at any time in any of these cases until the present one.

We could just as well say that if $2,080,000 bonds could have been issued in addition to what was outstanding for sewers at this time, that had there been outstanding for sewers at the time of issuing these bonds $2,080,000, still the city could have issued under such reasoning $2,080,000 more for light and water purposes. Such reasoning would construe the constitution of the State of Washington out of existence and override the will of the people as expressed in their written constitution. That such question was not before the court and the indebtedness for sewer purposes not construed by this court in the second Seymour case, we herewith embody and make a part of this petition the second joint brief, it being the brief in the second Seymour case, which contains the complaint and other pleadings and the argument of all parties to the litigation, to show that no such question was ever before this court in that case.

We trust that this court will not overlook such important facts, as cases are decided upon facts as presented and decisions of courts are for the common safety and protection of all. Which brief is as follows:

124 In the Supreme Court of the State of Washington, May Session, 1893.

EDMUND SEYMOUR, Respondent,
vs.
THE CITY OF TACOMA, HERBERT S. HUSON, SAMUEL C. SLAUGHTER, Geo. W. Boggs, John T. Lee, and The Tacoma Light and Water Company, Appellants.

Transcript and Briefs.

Parsons, Corell & Parsons, and F. H. Murray, appellants' attorneys.
A. E. Buell, attorney for respondent.
Filed May 26th, 1893.

125 In the Superior Court of the State of Washington in and for the County of Pierce.

EDMUND SEYMOUR, Plaintiff,
vs.
THE CITY OF TACOMA, HERBERT S. HUSON, Samuel C. Slaughter, Geo. W. Boggs, John T. Lee, and The Tacoma Light and Water Company, Defendants. } Complaint in Equity.

The complaint of the above-named plaintiff for himself and other property-owners and tax-payers in the city of Tacoma respectfully shows:

126 I.

That he is a resident in the city of Tacoma and is the owner of real and personal property therein subject to taxation for all proper municipal purposes.

II.

That the defendant, The City of Tacoma, now is and at all the times hereinafter mentioned was a municipal corporation of the first class within the State of Washington. That the defendants, Herbert S. Huson, Samuel C. Slaughter and George W. Boggs are respectively the mayor, the controller and treasurer of said city. That the defendant John T. Lee, is the president of the city council of said city.

III.

That the defendant, The Tacoma Light and Water Company is a corporation incorporated under the laws of said State, and as such is the owner of a system of water works constructed under authority granted to it by the said city, which now is and for a long time prior to all times hereinafter mentioned was used for the purpose of supplying the said city and the inhabitants thereof with
127 water for their necessary uses. That it is also the owner of an electric-light plant operated in part for lighting the streets of

said city and supplying said city with electric light for its corporate uses, the right to maintain and construct which was conferred upon the said Tacoma Light and Water Company by ordinances duly adopted by said city.

IV.

That at some time prior to the 4th day of March, A. D. 1893, the defendant, The Tacoma Light and Water Company offered to sell to the said city its said water works together with certain rights privileges and property owned by it and designed by it to be used in the construction of certain extensions to the system owned and operated by it for the purposes aforesaid, and to sell its said electric-lightiing plant so far as the same is now used for the corporate purposes of said city, for a purchase price for said water works and electric-lighting plant of one million seven hundred and fifty thousand dollars.

V.

That on the 4th day of March, A. D. 1893, the council of
128 said city passed an ordinance, being ordinance No. 790 of said city, which ordinance was approved March 6th, 1893, and duly published in accordance with law. By the terms of said ordinance a special election was called to be held on the 11th day of April, A. D. 1893, to submit to the voters of said city the proposition whether the city should purchase the said water works and lighting plant for the sum of one million seven hundred and fifty thousand dollars ($1,750,000) and construct extensions to said water works at an estimated cost of four hundred thousand dollars ($400,000) to be used for that purpose and to issue its negotiable coupon bonds therefor. By the terms of said ordinance the city clerk was directed to give notice of said election and the proposition to be submitted thereat, which notice was required to be published in the city official newspaper for thirty days next preceding said election and to be posted for a like period at all of the places designated therein for holding said election.

VI.

That the notice of said election was published in the city official newspaper for the period from March 11th, 1893, to April 9th, 1893, inclusive, which period of thirty days is not the period of
129 thirty days next preceding the said election held on April 11th, 1893, and that said notice was not posted as required by said ordinance in that it was posted only twenty-six days next preceding said election and not more, and that by the failure to publish and post said notices, as required by the terms of said ordinance, the election held on April 11th, 1893 was not held by lawful authority, and all the proce-dings which may be taken thereunto would be and are void.

VII.

Said ordinance provided if the proposition therein contained was ratified by the voters, that thereupon the mayor of said city should be authorized and directed to issue in the name of the city two thousand one hundred and fifty negotiable coupon bonds of the city of Tacoma, each in the sum of one thousand dollars ($1,000), and that thereafter the sinking-fund commission of the said city should sell and negotiate the same.

VIII.

That at said pretended election more than three-fifths of the votes cast were in favor of the proposition by said ordinance submitted.

130

IX.

That at all times herein mentioned the said city has been indebted in a large sum, to wit, in a sum in excess of one and one-half per centum of the taxable property therein as ascertained by the assessment for city purposes, but that no part of this indebtedness was incurred for water, lights or sewers.

X.

In accordance with the provisions of the charter of said city, the controller thereof as assessor listed the property in said city for taxation during the months of January and February, 1893, and that the list of said property thereupon was equalized by the board of equalization of said city during the month of March, 1893, which said board completed its labor and finally adjourned on the 27th day of March, 1893; and that thereafter the clerk of said city certified the said list to the controller of said city on the 29th day of March, 1893, and that thereafter, on the 13th day of May, 1893, the council of said city made a tax levy for the ensuing year of ten mills on the dollar of taxable property. That the amount of taxable property in said city as ascertained by said assessment thus
131 made and equalized is forty-one million, six hundred and eight thousand and fifty dollars and no more, and that the amount of these proposed bonds is more than five per centum thereof.

XI.

And plaintiff further says that said election was held under and by authority of an act of the legislature entitled "An act authorizing cities and towns to construct internal improvements and to issue bonds therefor and declaring an emergency," approved March 26th, 1890. As said act is amended by an act entitled "An act to amend section two of an act entitled 'An act authorizing cities and towns to construct internal improvements and to issue bonds therefor and declaring an emergency,'" approved March 26th, 1890, which said amendatory act was approved March 9th, 1891. By the provisions of said act of authorization the questions thereby required to be

submitted to the voters are required to be submitted at a special election.

XII.

That the council of said city by another ordinance submitted to the voters of said city a proposition whether said city
132 should become indebted and issue bonds for the purpose of building a certain bridge. That said proposition in reference to bridge bonds and said proposition in reference to the purchase of water works and the construction of extensions thereto, and of the purchase of a lighting plant were submitted to the voters of said city at an election held upon the same day, between the same hours, at the same polling places and conducted by the same election officers, and the two said propositions were printed upon the same ballot, and that by the submission of the said two propositions said election was not a special election for the submission of the said question of purchase as required by law.

XIII.

And plaintiff further says that Herbert S. Huson, Samuel C. Slaughter, George W. Boggs and John T. Lee, under the charter of said city constitute and compose a sinking-fund commission, and as such sinking-fund commission are authorized to negotiate and sell all bonds offered for sale by said city. That said commission are advertising for sale and will sell unless restrained by the order of this court, two thousand one hundred and fifty bonds of said
133 city, each in the sum of one thousand dollars; that said bonds are negotiable in form and recite upon their face as follows:

This bond is one of a series numbered from one to two thousand one hundred and fifty, inclusive, amounting in the aggregate to two million one hundred and fifty thousand dollars ($2,150,000), issued by the city of Tacoma for the purpose of borrowing money for supplying said city with water and light, as authorized by section 6, article 8, of the constitution of the State of Washington and the statutes of said State as follows: An act entitled, "An act to provide for the government of cities having a population of twenty thousand or more inhabitants and declaring an emergency to exist," approved March 24, 1890; "An act authorizing cities and towns to construct internal improvements and to issue bonds to pay therefor and declaring an emergency," approved March 26, 1890, as amended by an act approved March 9, 1891; and the charter of the said city, all of the requirements of the constitution, statutes and charter having been in all respects complied with, and the question of borrowing the said sum for the purpose aforesaid and issuing the negotiable bonds of the city therefor, having been by ordinance submitted to the qualified voters of said city at a special election held on the 11th day of April, 1893, and ratified by the vote of more than three-fifths of the qualified voters voting thereat.

And it is certified that the aggregate amount of said bonds is less

than five per cent. of the value of the taxable property within the corporate limits of the said city as shown by the last assessment for city purposes. And it is further certified that the total indebtedness of the said city is less than ten per cent. of the taxable property therein as shown by said assessment.

XIV.

134 And plaintiff says that neither the city of Tacoma nor the said sinking-fund commission are authorized to issue said bonds or to sell or negotiate the same for the following reasons:

First. An election as required by law to authorize the issuance of said bonds has never been held, and the pretended election held on the 11th day of April, 1893, is without force or effect in law, in that it was not a special election, in that the notice of election was not published as required by statute and by the ordinance calling it, and in that the notice of election was not properly posted as required by the ordinance calling it.

Second. The debt to be incurred by the issuance of said bonds is to be incurred for the purpose of supplying said city with water and artificial light, and will be more than five per centum of the taxable property in said city, as ascertained by the last assessment made for city purposes.

XV.

That the said sale and negotiation of said bonds will cause the expenditure of money by the city, and if sold will involve the city in expensive litigation, all of which is to the damage of this plaintiff and other tax-payers of said city.

135 Wherefore plaintiff prays that the said city and its said officers and the said sinking-fund commission be enjoined and restrained from issuing said bonds, or in any other way incurring said indebtedness or obligations or attempting to obligate the said city for the payment thereof, and for such other and further relief as may be equitable and proper, and for the costs of this action.

ALFRED E. BUELL,
Plaintiff's Attorney.

STATE OF WASHINGTON, }
County of Pierce, } *ss:*

Edmund Seymour being first duly sworn says that he is the plaintiff above named who makes the foregoing complaint; that he has read said complaint, knows the contents thereof and believes the same to be true.

EDMUND SEYMOUR.

Subscribed and sworn to before me this 11th day of May, 1893.

L. B. LOCKWOOD,
Notary Public in and for the State of Washington,
Residing at Tacoma, Pierce County.

136 *Separate Answer of the Defendant The Tacoma Light and Water Co.*

Now comes the defendant, The Tacoma Light and Water Company, and for its separate answer to said complaint says:

I.

That it is now and for a long time prior to any of the matters alleged in said complaint it was a corporation duly incorporated for the purpose of constructing and operating light and water plants and works at the city of Tacoma for the supply of said city and its inhabitants with light and water.

II.

That long prior to any of the times mentioned in said complaint, it had constructed such plants at great expense, and had operated the same under franchises duly conferred by ordinance upon it and its assignors for said purposes. That said works, both for the supply of light and water were in all respects fit, proper and adequate for the supply of said city, and that it had at all times for several
137 years prior to the commencement of the negotiations hereinafter particularly set forth supplied said city and its inhabitants with both light and water, whenever application therefor was made by the latter, at reasonable rates and in all respects in accordance with the terms of the ordinance under which it had constructed and maintained and now maintains its said light and water works. That in the month of July, 1892, the said city by its proper officers, to wit, a duly appointed committee of the city council thereof, applied to this defendant to ascertain whether it would sell its said water plant and its electric-light plant, so far as the same was necessary to supply said city with electric light in its corporate capacity and upon what terms it would sell the same. That prior to that time this defendant had at large expense, to wit, at an expense of more than one hundred and fifty thousand dollars purchased and obtained the right to use certain other sources of water supply, and had adopted the necessary plans for the connection thereof with its then established and existing system for the supply of said city, so that the same should constitute one system; that the said extensions were necessary to provide an adequate supply of water for said city, whether the same should be done by this defendant
138 under said ordinances and its previous and then existing contract with said city, or by the said city as the owner thereof. That the expenses then incurred and the progress made for the construction and carrying out of said extensions were such that this defendant would not have entertained negotiations for the sale of its said water plant and works, as the same had then been constructed and were in actual use, without including the rights which it had acquired and then owned in the water supplies and its right of way from the source of supply to said city, that the

same except as a part of said completed system would have been of no value whatever, and the moneys expended therefor by this defendant, unless the same were included in said purchase or proposed sale or a price paid for said established works sufficient to cover the same, would have been a total loss to this defendant. That in accordance with said request, this defendant did thereafter, to wit: on the 16th day of August following offer to sell its said water and electric-light works to the said city according to a specification thereof, particularly set out in detail, including such rights as it had acquired for the extension of said water works for the sum of one million, eight hundred and fifty thousand dollars.
139 That it made no offer to sell the then existing plants independently of said proposed extensions.

III.

That thereafter and on or about the first day of September, and between that day and the 22nd of October then following, the said city, by its said officers and committees of its city council, made a careful examination of said property with the aid of an engineer employed by it, who reported to the city council as to the value of said water and electric-light plants, including the property then owned by this defendant and proposed to be used by it in completing and carrying out the said proposed extensions. That upon the making of said report the said city council proceeded from time to time at its regular meetings, as provided by the charter of said city, to consider said offer of sale. That at a regular meeting thereof upon the 4th day of January, 1893, it resolved to purchase said works, including said proposed extensions, as this defendant had offered to sell the same, except as to the sum to be paid therefor. That it was then well known both to the members of said city council and to this defendant that the said proposed sum was in excess of one and one-half per cent. of the valuation of the taxable property
140 in said city as shown by the last assessment, and that it was less than five per cent. of said valuation. That upon the said 4th day of January, the said city council directed the preparation of an ordinance for the purpose of making said purchase and submitting the question to the qualified voters of said city whether the same should be made for the sum of one million seven hundred and fifty thousand dollars, which sum this defendant before the final passage thereof agreed to and with said city to accept upon the terms and conditions stated in said ordinance as the consideration for the purchase of the completed works of this defendant, including its proposed plan of extensions and the rights and property then owned by it in connection therewith, to be used for the purpose of carrying out the plans which it had made and adopted for the completion of its said water works. That the sum necessary to complete the same was estimated at four hundred thousand dollars. That it was then well known by this defendant and the mayor and city council of said city that the said proposed extensions were an essential and necessary part of the plan adopted, and of any works

and system which should be established for the present and future supply of said city, and that by reason of the growth and
141 present population of said city, any system which did not include said proposed extensions would be inadequate and insufficient for the supply of said city and its inhabitants. That all negotiations between this defendant and said city included said proposed extensions and plan as a part thereof. That said ordinance was duly passed at a regular meeting of said city council upon the 4th day of March, 1893, approved by the mayor of said city upon the 6th day of March, and went into effect after three days' publication thereof as required by the charter of said city, upon the 9th day of March.

The form of ballot used at said election was as follows:

Shall the city of Tacoma purchase the water works and electric-light plant and sources of supply of the Tacoma Light and Water Company for the sum of one million seven hundred and fifty thousand dollars; and construct extensions to said water works at an estimated cost of four hundred thousand dollars, and borrow the sum of two million one hundred and fifty thousand dollars, to be used for said purpose, and issue its negotiable bonds therefor?

All persons in favor of said proposition shall vote as follows: For the purchase of the water works, electric-light plant and sources of supply of the Tacoma Light and Water Company, and the construction of extensions to said water works and the issuing of negotiable coupon bonds of the city therefor.

Those voting against said proposition shall vote as follows:

Against the purchase of the water works, electric-light plant
142 and sources of supply of the Tacoma Light and Water Company and construction of extensions to said water works and the issuing of the negotiable coupon bonds of the city therefor.

IV.

That in pursuance of said ordinance and in accordance with the terms thereof the same was after thirty days' notice by publication in manner and form as set forth in said complaint and by the posting thereof by the city clerk as therein set forth, duly submitted to the qualified voters of said city for their ratification or rejection at a special election held in all of the precincts or voting places of said city upon the 11th day of April then following. That the time and places of holding said election were known to all the qualified voters in said city. That the number of votes polled thereat was five thousand one hundred and seven, more than three-fifths of which were in favor of the purchase of said water works and electric-light plant as specified in said ordinance and for the proposition submitted in form as aforesaid and the extension of said water works, as one proposition and not otherwise. That at the time provided by the charter of said city, to wit: upon the Tuesday next following said election, the city council of said city met and duly canvassed the vote cast for and against the proposition so sub-
143 mitted, and after having so canvassed the same declared the result thereof to be that the proposition had received more

than three-fifths of the total number of votes cast at said election, and having received such majority that said proposition and proposed purchase and extension and the proposed issue of said bonds so submitted as specified in said ordinance was duly ratified as provided by law and the charter of said city.

V.

That during all of the times from the commencement of said negotiations to the time of holding said election and canvassing the vote thereof, the assessment of said city made for the year 1892 showed the value of the taxable property therein to be forty-three million seventy-four thousand one hundred and forty-seven dollars. That the total indebtedness of the said city for all purposes whatsoever including the issue of said bonds as proposed, was at that time and at all times and now is less than ten per cent. of said assessment. That the said city was not at any of said times and is not now indebted in any manner to an amount exceeding one and one-half per centum of the taxable property therein as shown by the last assessment thereof for municipal purposes incurred with-
144 out the assent of three-fifths of the voters therein voting at an election held for that purpose, nor was it at any time nor is it at this time indebted in any manner to an amount exceeding five per cent. shown as aforesaid, incurred with such assent, nor was any portion of said indebtedness exclusive of the indebtedness for the light and water plants as herein stated, incurred for supplying said city with water, artificial light or sewers, nor will the total indebtedness of said city in case of the issuance of the bonds referred to and set out in said complaint exceed or equal ten per cent. of the value of the taxable property therein as shown by the last assessment for municipal purposes now on file in the proper offices of said city and in force and operation at all of said times and now in force and operation, unless said assessment-roll shall have been in law superseded by reason of the facts hereinafter stated.

VI.

That at all of the times during the pendency of said negotiations, to wit: from July, 1892, to the present time, there has been and now is in the treasury of said city a sum largely exceeding one hundred thousand dollars belonging to what is known and desig-
145 nated as the general fund, which may under the provisions of the charter of said city be used for the purpose of discharging any outstanding indebtedness. That the amount of said fund at this time exceeds one hundred and forty-eight thousand dollars, and this defendant is informed and believes that before the issuance of said bonds as proposed by said city, the amount thereof will not be diminished but will be largely increased.

VII.

This defendant further says that it has been at all times and now is able, ready and willing to comply with its agreement with said city

as the same is recited in said ordinance, and upon the terms and conditions therein specified, to convey said property and each and every tract, parcel and portion thereof, real and personal, according to the terms of its specifications to and with said city, and as accepted by it in all respects, in accordance with said ordinance.

VIII.

Further answering the tenth paragraph of division of said complaint, this defendant says that the said assessment-roll is not now valid or operative, and it cannot be in its present condition
146 completed and used or legally enforced for the collection of the taxes for the year 1893, for the following reasons: That the same does not show what the amount of said taxes will be, and has not been certified, and is not now ready or in condition to be certified by the controller of said city to the treasurer as the assessment for the year 1893. That at the time of the passage, approval and going into effect of said ordinance, to wit: on the 9th day of March, 1893, the same was wholly incomplete and uncertain as to the amount thereof. That the same is contained in fourteen books or volumes of more than two thousand pages, each page containing forty-eight lines or entries, and there was not either at the time of the going into effect of said ordinance or of its ratification by the voters of said city, as hereinbefore set forth, any means of ascertaining the aggregate amount thereof or the total value of the taxable property in said city as the same had been listed by the deputy assessors, without adding the entire number of columns contained in said books. That the said books are prepared in the office of the controller of said city, who, by virtue of his said office is the city assessor, from detailed lists prepared by thirty-six deputy assessors, each list being upon a separate sheet; that it would be wholly
147 impracticable without, as this defendant believes, many weeks of labor, to ascertain from said detailed lists the value of the taxable property in said city. That the said assessment-rolls have not at this time been completed, but are now in the hands of the city controller, and will not be ready or complete for certification by the controller of the city of Tacoma before the first day of June.

IX.

Defendant further says that the real, actual and marketable value of the taxable property of said city upon a fair and reasonable valuation at this time, and at all the times mentioned in said complaint, would greatly exceed the sum mentioned in either of said assessments, and as this defendant is informed and believes to be true, would be nearly twice the amount of the greater of said sums.

PARSONS, CORELL & PARSONS,
Attorneys for Defendant, The Tacoma Light and Water Company.

STATE OF WASHINGTON, } ss:
County of Pierce, }

Charles B. Hurley of the city of Tacoma, being duly sworn
148 says that he is the manager and superintendent of the defendant, The Tacoma Light and Water Company; that he has read the foregoing answer, and verily believes the statements therein contained to be true.

CHAS. B. HURLEY.

Subscribed and sworn to before me this 15th day of May, 1893.

EDWARD L. PARSONS,

[SEAL.] *Notary Public in and for the State of Washington, Residing at Tacoma.*

The Separate Answer of The City of Tacoma, Herbert S. Huson, Samuel C. Slaughter, George W. Boggs, and John T. Lee.

Now come the above-named defendants, The City of Tacoma, Herbert S. Huson, Samuel C. Slaughter and John T. Lee, and for their separate answer to said complaint say:

First.

They adopt the answer of their codefendant, The Tacoma
149 Light and Water Company, and ask that the same in all respects be considered a part of this their answer, as if herein fully set out.

Second.

For a second and further answer they say: That it is for the best interests of said city, and the city council thereof upon full information and consideration has determined it so to be, that the said city should own and in all respects control the necessary works for supplying light and water for the corporate use of said city, and for the use of the inhabitants thereof. That upon such consideration it was determined by the said city council that it would be to the best interests of said city to purchase the said works of the defendant, The Tacoma Light and Water Company, and that the attempt to construct works for said purpose, in view of the works already owned and operated by said defendant, would be if not wholly impracticable, greatly to the prejudice of said city. That after a full investigation of all the facts believed by the said city council to be necessary for a fair and just determination of all questions connected with supplying said city and its inhabitants with water and light, said city council did accept the offer of its codefendant as al-
150 leged in its answer, and the same having been ratified as therein alleged at an election held for that purpose, these defendants, constituting the sinking-fund commission of said city, have in accordance with said ordinance prepared and are now preparing the said bonds in the name of said city as in said complaint alleged, and have advertised for bids therefor, and they now believe

it to be to the true interest of said city and of the inhabitants thereof that the purchase and extension of said water and electric-light plants should be made, as provided by said ordinance and agreed upon between said city and its said codefendant.

F. H. MURRAY,
Attorney for Above-named Defendants.

(Duly verified.)

Demurrer to Answers.

Now comes the plaintiff and demurs to the answers of all of the defendants herein, and for cause of demurrer says that said answers do not contain, nor does either of them contain, facts sufficient to constitute a defense to this action.

ALFRED E. BUELL,
Plaintiff's Attorney.

151 In the Superior Court of the State of Washington in and for the County of Pierce.

EDMUND SEYMOUR, Plaintiff,
vs.
CITY OF TACOMA *et al.*, Defendants. } No. 9706.

Decree in Equity.

On this 18th day of May, A. D. 1893, this cause coming on for hearing upon the demurrer of plaintiff to the answers of defendants, that said answers do not state facts sufficient to constitute a defense, and the parties to this action, both plaintiff and defendant, appearing by counsel and having been fully heard and the court
152 being fully advised in the premises, it is hereby ordered, adjudged and decreed that the said demurrer be sustained, and the defendants having elected to stand upon their answers filed herein, it is further ordered that an injunction issue as prayed for in plaintiff's complaint, and that the defendants and each of them be and are hereby restrained from negotiating and selling and issuing the bonds proposed to be issued for the purchase of the water and light plants of the Tacoma Light and Water Company and extensions thereto, as set forth in plaintiff's complaint, and the defendants each gave notice in open court that they appeal to the supreme court of the State of Washington, all the parties to this action being present at the said time.

EMMETT N. PARKER, *Judge.*

May 18, 1893.

Appeal Bond.

Know all men by these presents, that we, the Tacoma Light and Water Company, as principal, and Charles B. Hurley, of the city of Tacoma, State of Washington, as surety, are held and firmly bound unto Edmund Seymour in the sum of three hundred dollars, lawful

money of the United States of America, for which payment
153 well and truly to be made, we bind ourselves, our heirs, executors and administrators.

Sealed with our seals and dated this 18th day of May, 1893.

The condition of the above obligation is such that whereas, judgment was rendered on the 18th day of May, 1893, in an action in the superior court of Pierce county, State of Washington, wherein the above-named Edmund Seymour was plaintiff and The City of Tacoma, Herbert S. Huson, Samuel C. Slaughter, George W. Boggs, John T. Lee, and The Tacoma Light and Water Company were defendants, which said cause is number 9706, and whereas, said defendants have appealed from said judgment to the supreme court of the State of Washington.

Now, therefore, if the said defendants shall pay the said Edmund Seymour all costs and damages which may be adjudged against them on said appeal, or on the dismissal thereof, not exceeding said sum of three hundred dollars, then this obligation shall be void, otherwise to remain in full force and effect.

TACOMA LIGHT AND WATER CO.,
By CHAS. B HURLEY.
CHAS. B. HURLEY.

154 STATE OF WASHINGTON, } ss:
County of Pierce, }

Chas. B. Hurley being duly sworn says, that he is a resident and freeholder of the county of Pierce, that he is not a counsellor or attorney-at-law, sheriff, clerk of the superior court or other officer of said court, and that he is worth the sum of three hundred dollars over and above all debts and liabilities, exclusive of property exempt from execution.

CHAS. B. HURLEY.

Sworn and subscribed before me this 18th day of May, 1893.

EDWARD L. PARSONS,
Notary Public in and for the State of Washington,
Residing at Tacoma.

155 *Brief for Defendants.*

First.

The assessment of 1892 was in fact the last assessment during all of the times of the negotiations between the city and the light and water company, and it is at this time the only completed assessment, the assessment for 1893 not having yet been certified or in a condition to be certified by the controller to the city treasurer. The negotiations began in July, 1892, the ordinance in question was introduced January 4th, 1893, passed March 4th, and went into effect by publication March 9th, and was ratified at the polls April 11th. The indebtedness of the city was at all times and assuming the as-

sessment for 1892 to be the proper one, including the bonds in question, will be within the constitutional limits.

First. Under these circumstances could the city of Tacoma at the time of the introduction of the ordinance in question, or at the time of its going into effect by publication or at the time of its
156 ratification, lawfully enter into an agreement for the purchase or construction of water and light plants involving an expenditure to the amount contemplated by the proposed bonds?

The limitation of municipal indebtedness by constitutional provision is of recent date. The language of all the constitutions which I have had an opportunity to examine is either identical with or substantially the same as ours, except those of New York and Iowa. The words in general use are "the last assessment." The language of the New York constitution is "the last assessment-roll;" that of Iowa is "the last tax-list."

I understand the word assessment to indicate not the means of reaching the ascertainment of the sum to be paid by each individual property-owner but the result itself, the amount in dollars and cents which he is to pay. The assessment-roll is one of the steps necessary for the determination of this amount. The list of the property, the opinions of the deputy assessors, their revision by the assessor himself, the revision of his revision by the board of equalization, are but so many steps towards making an assessment, which is only completed by the tax levy made up and put into the
157 form required by the statutes of the State or the charter of the particular municipality.

Under the charter of the city of Tacoma, after all these things have been done, the rolls go to the city controller for extension and addition, when completed to be certified by him upon oath to the city treasurer, which must be done on the first Monday in June. As I understand the proper use of the word it then becomes for the first time an assessment, or in the language of the Iowa constitution "a tax-list." So authenticated it is for the first time a public record to which all persons interested in the inquiry may and have a right to go to ascertain the assessed valuation of the taxable property within the limits of the corporation, and consequently the limit of the indebtedness which it can lawfully incur. That every person before that time has a right to see for himself that his property is properly listed and valued, does not, in my opinion, affect this question.

The only decisions which I have been able to find in which the meaning of any of these forms of expression was under immediate consideration, or which to me have seemed to have any strong
158 bearing upon the question of the construction to be given to these words, are the following:

People *vs.* Suffern, 68 N. Y., 321. This was a proceeding by the village corporation then before the court to issue bonds under an act of the legislature requiring the consent of a majority of the taxpayers representing a majority of the taxable property upon the assessment-roll last completed before the first presentation of the petition. Under the law then before the court, the assessment-roll

would go directly from the village assessors to the tax-collector, to be authenticated by the oath of the assessors that they had heard all complaints and corrected the roll. The document presented (so spoken of by the court) was in all respects complete, except that it wanted the oath of the assessors. It had been delivered to the collector, and he was then collecting the taxes upon it. Wanting the oath of the assessors, the court say it was not a complete assessment-roll. No question was made that it showed all of the property, that the valuation was in fact correct, that the requisite consent of a majority of the tax-payers had been obtained. The only question was whether wanting the oath of the assessors it was a completed
159 assessment-roll. The court held that it was not, and said that the roll of the preceding year should have been presented. Unless there is a difference between an assessment-roll and a completed assessment-roll, this case, it seems to me, is an authority in point, with the added consideration that the roll in that case was further advanced than in the present, and that it was the recognized roll upon which the property-holders of the village were then paying their taxes. In this case, the work of making the roll is not yet completed, and when the work is done it requires, as in that, that it shall be authenticated by the certificate of the proper officer—controller—to its correctness before it can be placed in the hands of the treasurer for collection.

In Van Renoselaer *vs.* Witbeck, 7 N. Y., 517, the court held that the warrant to a tax-collector, consisting in part of the assessment-roll to which the certificate of the proper officer was wanting, was fatally defective and rendered the process no protection to the officer. To this assessment there can be no certificate until the first Monday of June.

In Westfall *vs.* Preston, 49 N. Y., 349, it was held that for the purpose of verification and delivery to the supervisor, the roll
160 could not be completed until after the time fixed for its final review and correction. That an affidavit of the assessors prior to that time was a nullity. Unless the word "assessment" standing alone means one thing and a "completed assessment" means another thing, it is clear that the roll in question is not an assessment; that the proceedings necessary to give it that character are not yet completed.

In Bellinger *vs.* Gray, 51 N. Y., 610, it was held that an assessment-roll not verified was fatally defective.

In Wells *vs.* Smyth, 55 Pa. St., 159, it was held that taxable property is assessed when the assessor has returned his list of property and valuation, and the commissioners have apportioned the rate per cent. Taking the date of the tax levy by the council in this case as subject to this rule, the assessment was not made until May 13th, after which to render it legally valid for the collection of taxes, it required to be completed and certified by the controller.

In Wilkinson *vs.* Van Orman, 70 Iowa, 230, under the language of the constitution of that State, the court made a distinction
161 between an assessment roll and a tax-list. In that case, the assessment-roll for 1885 had been equalized by the township

board of equalization and filed with the county auditor prior to the vote authorizing the issue of bonds. The tax in that case as in this, however, was not levied until after that time. The court held that until the levy was completed and the taxes entered thereon there was no completed tax-list, and that the list for the preceding year was the proper one. If the word "assessment" implies, as I have argued above, that all of the steps necessary to the legal collection of the tax—of the assessment—are necessary to make it a completed assessment, and that there is no difference between an "assessment" and a "completed assessment," this cause is a direct authority in support of the claims we are now making.

These cases seem to me to lay down the true rule, but in the absence of any authority direct or bearing upon the question, what in reason—judicial reason or good business sense—should be the construction of the provisions of the constitution referring both the officers of the city and those dealing with it, either as contractors or as prospective purchasers of its bonds to a particular source
162 of information, to the particular source of information indicated by the words "the last assessment"? Manifestly if it is to be a source of information at all, it ought to be one where the inquirer, whether a city officer or a bond-purchaser can, or could by possibility, find out what he wants to know, what it is necessary that he should know. In the month of July, 1892, when the city entered upon these negotiations, or the month of October when its engineer reported, or in January when it had decided upon the expediency of making the purchase, or at the next session of its council when the negotiations had reached the point of an agreement as to price, or when the ordinance was passed, approved and finally ratified, at all of these times both the city and this defendant, The Tacoma Light and Water Company, were either warranted in acting upon the information which the last assessment then on file in the proper city office gave them, or they were without any possible source of information as to whether they could lawfully make the agreement—the sale and purchase—which was then being negotiated. If immediate steps had been taken to carry the agreement into effect, to make payment as agreed upon, there would have been at that time, not only no other source of information, but abso-
163 lutely none for suspicion. It was not even a thing that depended upon some then unknown and to be discovered fact. The validity of the contract made in perfect good faith upon both sides and after a very considerable expenditure by both parties, and which both parties were ready and willing to carry out, would depend not upon the discovery of some new fact, but whether there might not be a difference of opinion between the present assessor and his predecessor upon a question as to which no two men would be likely to agree, namely, a question of the value, not of one piece of property, but of several thousand, to which may be added the further element of uncertainty that these estimates are not to be made by one man but by thirty-six men—deputies—acting independently of each other, their work—detail statements—subject to examination and revision by a board of officers who must from the

very nature of the case and the short time allowed them for the performance of their duties be wholly incapable of obtaining the necessary information or making the necessary examination for making anything like a just estimate of the value of the property upon which they are officially required to pass. To assume that all contracts must be made subject to the rule contended for, that it
164 is by a future or pending assessment, and not by a present completed assessment, would place it beyond the power of any municipal corporation now or at any time to enter upon negotiations of this kind with any degree of business judgment or intelligence, or with any degree of certainty that whatever they might do might not be wholly nullified by what it was impossible that they should have known at the time it was done. The construction contended for if it would not certainly, might place it in the power of one man by lowering valuations for that very purpose to defeat the wishes of more than three-fifths of the tax-payers of the city as legally expressed at the polls. The conditions which appear in this case and the circumstances now shown are just as likely to occur next year or the year after, and indefinitely. If there is no present source of information to which the parties have a right to go, or to which it is possible that they should go, and upon which they have a right to rely with the certainty that it is not possible for any one man or for any board of public officers to change what there appears, because they differ in opinion with their predecessors, it is futile for any municipal corporation of the State ever to talk of either constructing or purchasing light and water plants, or of making
165 contracts of any other kind involving the incurring of any considerable bonded indebtedness.

Second. Assume that the assessment begun in January, 1893, was so far completed when it passed from the hands of the board of equalization to the city clerk, March 27th, as to be the last assessment within the meaning of the constitution, would the proceedings which had then passed into ordinance and which we suppose in effect to be a contract between the city and the light and water company subject only to ratification at the polls, be thereby rendered null and void?

Childs *vs.* The City of Anacortes, 32 Pac. Rep., 227, so far as the purchase of the light and water plants then in existence and the sources of supply for the future were then owned by the company are concerned, certainly decides this question in the negative, and we think the principles there announced applied to the facts of this case decide the entire question in accordance with our claims.

The purchase by the city of what was then completed being the works at that time actually operated by the company including the source of supply and the extensions then planned, and which
166 the company was about to make upon its own account, were to all intents and purposes, we submit, one proposition. The ordinance embracing both was—the terms and price being settled—upon its acceptance by the company a valid legal contract. I think it may be safely assumed that this court or any other would be exceedingly reluctant to nullify all these proceedings by construction

unless the terms of the constitution or of the statutes to be construed were so plain as to exclude every other reasonable construction. That this would be especially so when the fact relied upon to bring about this result not only did not exist at the time the proceedings were going on, but was of such a nature that its future existence could not be at all predicted, namely, that the incoming city officers would differ in opinion from their predecessors, not as to any known fact nor as to any fact which could by possibility be known, but simply as to the question of the value of the property within the corporate limits of the city.

There have been many cases before the courts where between the time of the proceedings had by the officers of the municipality and the time fixed for performance, or the happening of the
167 condition upon which the obligation would arise there has been a change, in some cases of the statutes, under which they were instituted and in some, of the constitution itself.

County of Moultrie *vs.* Savings Bank 92 U. S. 631. In December, 1869, the board of supervisors, under the statutes then in force, ordered that a subscription be made to the capital stock of the railroad company in question, and that bonds be issued when the road should be opened for traffic between certain points. April 15th, 1870, the president and clerk of the board of supervisors entered into a contract with the company in accordance with the provisions of the resolution. The road was opened in 1873, when the bonds were delivered to the company. In the meantime, the new constitution had gone into effect, July 2nd, 1870, which prohibited subscriptions of that character. The court held that the action of the board in 1869 was in legal effect a subscription, and although no subscription was in fact made, and although the railroad company did not become entitled to receive the bonds until after the new constitution went into effect, that the bonds were valid, saying: "The delivery of the bonds was no more than performance of the contract."

168 Scipio *vs.* Wright, 101 U. S., 665. The action was upon bonds issued by the town of Scipio under the authority of an act of the legislature authorizing towns to borrow money to aid in the construction of railroads upon the written assent of two-thirds of the resident tax-payers appearing on the assessment-roll made next previous to the time such money should be borrowed. Before the bonds were delivered a new assessment-roll had come into effect; it was claimed that that was the roll which should control. The court said: "The substance of the power was the creation of a town debt, all the rest was formal. That to leave the debt in existence and at the same time take away the power to provide the means for its payment would be most unreasonable," adding: "This debt was incurred before the assessment-roll of 1853 had any existence. The right to incur it when it was incurred was therefore complete. The exercise of the power was warranted by the written assent filed. For these reasons we think the instruments sued upon are not invalid, because they were not issued until after August 1st, 1853,

when the assessment-roll for that year was by law required to be completed."

Unless the proceedings now here are absolutely void by
169 reason of the inclusion of the sum provided for the extensions of the water works, we submit this case as an authority directly in support of the claims we make. But the appropriation of that sum is something more than a contemplated expenditure, it was in payment for rights which the city was acquiring, and which we submit were as much part and parcel of its contract with the water company as if the company had itself undertaken to make the extensions and the city to pay for them when made. There was but one proposition, one plan and one contract.

In Chickaming *vs.* Carpenter, 106 U. S., 667 the bonds were issued under a statute providing that they should be issued within sixty days after the question should be determined by a vote of the electors. The township officers did not issue the bonds within the time named in the statute. The court held that they could be compelled to do so after that time by mandamus.

In Munson *vs.* The Town of Lyons, 12 Blatch., 539, the proceedings for the issuance of the bonds in question were commenced under a statute of 1869, which required the consent of a majority of the taxpayers of the corporation whose names should appear upon
170 the last preceding assessment-roll. Before the proceedings were completed the act was amended. The proceedings were from that point on conducted in accordance with the statute as amended. It was objected that the proceedings had under the act so far as repealed were void. Held, that the objection was not good and the bonds were sustained.

Redrock *vs.* Henry, 106 U. S. 596, involved a question as to whether the statute under which the proceedings were commenced was repealed by a subsequent act of the legislature. The court held that it was not repealed, but in reaching this conclusion as to the proper construction of the latter act, it said "There is another consideration which is entitled, in our opinion, to some weight, that is, that before the act of 1870—the repealing act—was passed the railroad company had made considerable progress in performing the conditions upon which the town of Redrock had agreed to issue its bonds * * * It is true, it was under no binding contract with the town to go on and complete the line, but it had unmistakably manifested its purpose to do so and had expended and was expending large sums of money in an effort to comply with the conditions upon which the town had agreed to issue its bonds. If, under
171 these circumstances, the legislature had withdrawn the authority of the town to issue its bonds, or had imposed new conditions upon the issue, it would have been an act of bad faith. If possible we should give such a construction to the act of the legislature as would relieve the State from such an imputation."

In the case now here, both parties have incurred very considerable expense in the expectation that the purchase would be carried out and in reliance upon the validity of the proceedings under the assessment as it appeared at each progressive step. We think that

in such a case, involving a mere difference of opinion between one set of officers in office at the time the proceedings were had and their successors, that the court should with greater readiness hold to a construction which will uphold the proceedings had, and especially when sanctioned by the vote of the tax-payers, than when the question is one of the construction of a statute and the powers of the legislature.

Upon this subject, the effect of a change in the law, the cases are collected in 98 Am. Dec., 669. In leaving this branch of the argument, we submit:

First. That the assessment for 1892, even if the proceedings were to be instituted at this time, would be the proper and controlling one.

172 Second. That if it would not at this time, it was certainly so not only at the beginning of these proceedings, but up to their conclusion, up to the time when everything had been done except the manual execution and delivery of the bonds, the only thing now remaining to be done, and the thing which this action is brought to enjoin.

Third. That in legal contemplation the contract and proposition submitted and acted upon as the latter was, should be regarded as one, and if so all of the proceedings would be within the protection of the Federal Constitution; that if they could not be impaired by the legislature or by the adoption of a new constitution, it would be absurd to hold that they could be by a mere change of opinion by the officers of a municipality or a difference of opinion consequent upon a change of officers.

Relation: The doctrine of relation, of which frequent examples occur in the General Land Office of the United States, has been often held to apply to the proceedings of boards of public officers and those dealing with them.

In Gibson *vs.* Chouteau, 13 Wall., 100, it is stated in this 173 way: By the doctrine of relation is meant that principle by which an act done at one time is considered by a friction of law to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed. The last proceeding which consummates the proceedings is held for certain purposes, to take effect by relation as of the day when the first proceeding was had. The general rule has been variously defined by the courts and text-writers. It is generally stated in this way: That where there are divers acts concurrent to make a conveyance, estate or thing, the original act shall be preferred, and to this the other acts shall all have relation. The general doctrine and many instances of its application are cited in Blackwell on Tax Titles, section 793.

We think that when the city accepted the proposition and the people ratified it, it would—if it were necessary to appeal to that doctrine—take effect by relation, so far as necessary to secure to the other party the benefits of its offer from the date it was made.

Second.

Assume that the validity of these proceedings must depend
174 upon the amount of the assessment now being made in the hands of the controller, may the amount in the treasurer's hands be credited upon the amount of the issue? We submit that it should.

Dillon Mu. Corp., sec. 135, 4th ed., lays down the rule: If a municipal corporation has the means in its treasury to meet its indebtedness, the issue of warrants to an amount larger than five per cent. of its taxable property is not a violation of the section of the State constitution which provides that no municipal corporation shall be allowed to become indebted in any manner or for any purpose to an amount exceeding five per cent. of the taxable property within the corporation. In such case it would not become indebted within the meaning of the constitution. Among the cases cited are: Dively *vs.* Cedar Falls, 27 Iowa, 227; Burlington Water Company *vs.* Woodward, 49 *id.*, 58.

In Valparaiso *vs.* Gardner, 97 Ind., 1, it was held that where the current revenues of a city are sufficient to discharge all current expenses without increasing the indebtedness, there is no corporate debt incurred. That was a contract for the supply of water, to be paid for from time to time as furnished. At the time the
175 contract was entered into the amount agreed to be paid exceeded the constitutional limit.

In Sackett *vs.* New Albany, 88 Ind., 479, the court said: "The allegation of the complaint that there was no money in the treasury of the city of New Albany which could be applied to the payment of the claim was a material and pivotal allegation."

We cannot think that in the consideration of this case your honors will reach a point at which it will be thought to turn upon this question; but if it should become important to consider it, we think the authorities fully settle the question in accordance with the views here expressed.

Third.

It is alleged in the complaint and admitted by the answer that the notice of election was posted only twenty-six days, and that there was one intervening day between the last publication and the day of holding the election. It is alleged in the answer, however, that all of the electors of the city knew the time and places of holding the election, and that there was a very large vote. As I understand the rule, an election will not be judicially annulled
176 from the failure or inability of the officer charged with giving the prescribed notice, unless it is affirmatively alleged and shown that the electors had not in fact notice of the time and places of holding the election, and that the vote actually cast was such as to make it probable that the result would have been different if notice had been given in the exact manner named in the statute. Many of the cases go further, and hold that it must be affirmatively shown not only that a sufficient number of qualified voters to have changed the result failed to attend, but that they would in fact have

voted against the result as declared. McCrary on Elections so lays down the rule. Sec. 143, *et seq.* The question has been many times before the courts, both as to general and special elections, and the cases are practically uniform.

Dishon *vs.* Smith, 10 Iowa, 212, involves the question of the removal of a county-seat. Among other things, it was alleged that the statutory notice was not given. The court said that this was not jurisdictional, that the want of such notice would not invalidate the election.

In Wheat *vs.* Smith, 7 S. W., 161, the sheriff failed to publish notice of a special election as required by law. The court said as to a special election that "the electors must be informed of it, but
177 the established rule is that the particular form and manner pointed out by the statute for giving notice is not essential. Actual notice to the great body of electors is sufficient. The question in such cases is whether the want of the statutory notice has resulted in depriving sufficient of the electors of the opportunity to exercise their franchise to change the result. The courts hold that the voice of the people is not to be rejected for a defect or want of notice if they have in truth been called upon and have spoken. If the law were otherwise, it would always be in the power of a ministerial officer by his malfeasance to prevent a legal election."

We cannot think this question sufficiently doubtful to require or to excuse its prolonged discussion.

Upon the whole case it is confidently submitted not only that the proceedings required by the statutes and the charter of the city of Tacoma have all been substantially complied with, but that if the contention of the plaintiff is sustained, it would be practically out of the question for either the officers of any of the municipalities of the State or of those contracting with them to enter upon negotiations of any kind requiring the sanction of a vote of the people with any certainty that they would be sustained by the courts.

178 The provisions of the city charter relating to assessments begin at section 108 and extend to section 112.

They are as follows: January and February, preparation by the deputy assessors of the detailed lists. March, equalization. April, writing up the books by the controller as equalized; adding up the columns of valuation, ascertainment of the total value of all property listed with power to enter upon the assessment-rolls all property which has escaped assessment. May, the levy of the tax, this year made upon the 13th. The books are then returned to the controller who is to apportion the tax to the individual owners and carry out the amounts in separate columns of real and personal property; when done to be certified on or before the first Monday in June to the city treasurer, who has also the power after that time to enter for taxation all property which has escaped assessment. When so certified and not before, we suppose the list to be the assessment for that year.

Requirements as to detail lists, and form, 1 Hill's Code sections 1033 and 1069.

PARSONS, CORELL & PARSONS AND
F. H. MURRAY, *For Appellants.*

179 In the Supreme Court for the State of Washington.

EDMUND SEYMOUR
vs.
THE CITY OF TACOMA. } Brief for Respondent.

Argument.

It has been held by this court that the provisions of the "Bonds for internal improvement act" of March 26, 1890, as amended March 7, 1891, Hill's Code, sec. 696 *et seq.*, were applicable to the city of Tacoma and when the city seeks to acquire water works or a lighting plant it is bound by these provisions.

Metcalfe *vs.* Seattle, 1 Wash. St., 297.

Seymour *vs.* Tacoma, decided January term, 1893.

180 The mode of procedure required by this act as the same is interp-eted by this court is substantially as follows: When the council deems it advisable they pass an ordinance which adopts the system or plan proposed and declares the estimated cost. The proposition contained in this ordinance, to wit: the adoption of a system or plan at an estimated cost, must, then be submitted to the voters. If the proposition does not contemplate the incurring of an indebtedness, upon the affirmation of a majority of the voters the council is authorized and empowered to proceed to acquire said works and plant by purchase, construction or condemnation as may have been proposed. If, however, the proposition submitted to the voters contemplates the incurring of indebtedness it requires the affirmation of three-fifths of the voters and when that is given the council can proceed to acquire the said works and plant, and further are authorized and empowered to create an indebtedness and issue bonds therefor, up to the amount authorized, subject to the limitation that the debt or bonds shall not exceed five per cent. of the taxable property as shown by the last assessment-roll. The exact language of the statute on this point is as follows: "Which said indebtedness and bonds shall not exceed five per cent. of the
181 taxable property as shown on the last assessment-roll of the city or town made for general municipal purposes, such indebtedness and bonds to be additional to all other municipal indebtedness of the city or town created within constitutional limits."

The language of the statute is plain and unmistakable.

The proposition submitted to the voters of Tacoma by the counsel under the ordinance of submission, which ordinance was before this court in the former case of Seymour *vs.* Tacoma, decided at the January term, was as follows:

"Shall the city of Tacoma purchase the water works and electric-light plant and sources of supply of the Tacoma Light and Water Company for the sum of one million seven hundred and fifty thousand dollars and construct extensions to said water works at an estimated cost of four hundred thousand dollars, and borrow the

sum of two million one hundred and fifty thousand dollars to be used for that purpose and issue its negotiable coupon bonds therefor?"

This proposition is a single one, not segregated, or severa-
182 ble, and contemplates a single issue of bonds in amount $2,150,000. Passing by for a moment any question raised as to contractual rights in the Tacoma Light and Water Company and viewing the matter simply as the creation of indebtedness by the issuance of bonds, it is too plain for argument that the debt against the city arises by the issuance and sale of bonds: There is no creditor of the city until there is a bondholder, and the date of the creation of the debt is the date the bonds become an obligation. If at this date the amount of the bonds, to wit: $2,150,000, is more than five per cent. of the taxable property as shown by the last completed assessment for general municipal purposes the city has overstepped the statutory limitation and the bonds are void for want of power.

It is admitted that the amount is within five per cent. of the assessment for 1892, and that it exceeds five per cent. of the amount of the assessment for 1893, but it is urged that this roll for 1893 is not completed so that the taxable property of the city can be ascertained therefrom as provided by law.

It becomes necessary therefore to examine the question when the assessment-roll of the city of Tacoma becomes completed, so that the taxable property in the city is shown.

183 The provisions of the charter upon this point begin at section 108 and are included in article X.

Note in the first place that the offices of the city assessor and city controller are distinct and separate, although by force of section 6, article II of the charter, the city controller is *ex officio* city assessor, and that by force of section 109, article X, the city clerk is *ex officio* clerk of the board of equalization.

It is here contended both on principle and on authority of an unbroken line of decisions that when power is granted or limited upon the existence of some fact as shown by an assessment-roll, the roll is considered as completed and operative when the person or persons charged with listing taxables (including among such persons, of course, all bodies, tribunals or persons with power of correction by way of review or equalization) have completed their labors and such completion is shown by the record evidence in the manner and form prescribed by statute. The exact date upon which such an assessment-roll becomes operative is the date of such record evidence.

People *vs.* Suffern, 68 N. Y., 322. In this case held that an
184 assessment becomes operative when the township trustees as a board of equalization have completed their labors and the evidence of this completion is shown by the affidavit of the proper officer attached to the roll. The absence of such affidavit prevents there being a valid assessment.

It was the absence of the statutory evidence showing the final determination of the equalizers fixing the basis of taxation which invalidated the roll in this case.

State *vs.* Davison, 41 N. J. L. 505. "Until the assessor has so entered his determination of the amount of tax to be levied upon each, he has judicial control of the whole subject, and may reconsider his valuations, deductions and any other matters involved in his final decision. It is only this ultimate judgment officially announced that is unalterable."

The law in this case required the assessor to apportion the tax levy at the same time and upon the same roll that he listed the taxable property.

Wilkinson *vs.* Fulton, 70 Iowa, 230. In this case the clear distinction is made between the assessment-roll and the tax-list based thereon. I know of no case where the roll has been con-
185 sidered incomplete after the final action of equalization, and that action appears of record in the manner prescribed by law.

It would seem as though authority on such a proposition were needless. The object of the statute is to limit the power of creating indebtedness to five per cent. of the taxable property, and has made the assessment-roll the conclusive evidence of the amount of such taxable property. Now when that roll becomes complete as far as fixing valuations are concerned, does not this conclusive evidence come into existence? That this roll is to be thereafter used as a basis of taxation does not vary the amount of taxable property shown thereon. The assessment-roll must be complete before a tax levy can be made. A completed assessment is the necessary basis for taxation, as well as for computation of indebtedness.

Under the charter the city assessor delivers the roll as prepared by him to the city clerk, certifying to its correctness. Thereafter the board of equalization sits, and within three days after it adjourns the clerk delivers the assessment-roll thus equalized, and accompanies the same with his affidavit to the correctness
186 thereof. When the board becomes *functus officio*, the valuation of property in the city of Tacoma for purposes of taxation becomes fixed and unalterable, and the evidence of this finality and to the genuineness of the roll is shown by the certificate of the assessor and the affidavit of the clerk. When these show the completion of the work of assessment the assessment-roll is perforce complete.

The addition or segregation of valuations as thus fixed, or the making of a tax-list therefrom does not vary the assessment-roll or give it any validity as such. The taxable property is shown upon the roll whether the items have been added or not. When the integers are fixed the total sum is certain.

The powers granted by section 112, article X, are continuing powers to be exercised at any time during the year. If the mere existence of those powers renders the roll uncertain, it follows that there is no time in the year when a basis for computation is obtained. In the absence of allegation to the contrary it must be presumed that all taxable property has been assessed, and that the roll is correct in all particulars.

187 In this case the board of equalization adjourned March 27th, and the clerk certified the roll to the controller on the 29th.

II.

But it is urged that certain contractual rights have arisen in favor of the Tacoma Light and Water Company.

If this be so, what are these rights? The company in January offered to sell certain property. This offer the city could not and did not accept. The statute has not given to the council power to buy water works or lighting plants of its own motion, and this regardless of any necessary assent to the creation of indebtedness. The council could only incorporate the system or plan of the works and plant and a statement of the cost of purchase in an ordinance and submit the question to the voters: Since the council could not accept the offer and bind the city, no contractual rights arose in either by force of the passage of the ordinance. Upon the affirmative vote of the electors the language of the statute is "the said corporation shall be authorized and empowered," etc. The action of the voters operated as a ratification, not of any inchoate contract, but of the system or plan proposed to them in its physical
188 aspects. The voters said in effect, "We are willing that the works and plant of the company shall become the works and plant of the city, and to accomplish this we assent that the city incur a debt by the issuance of bonds." Now by force of this election the council becomes clothed with authority, first, to issue long-time bonds, and second, with the proceeds to purchase the system of water works and lighting plant specified in the ordinance. The election did not make or ratify a contract; it empowered the council to contract.

But argument on this point seems to me superfluous since this court has already decided the question.

In Yesler *vs.* Seattle, Wash. St. 308, it was held that an election held under this act for the purchase of water works did not create a contract.

A contract arises by the acceptance of an offer, and the date of the contract is the date of the acceptance. If the voters made a contract the date is April 11th. It must be admitted that the council did not have power alone to so contract, nor did it so attempt. It submitted the proposition to the voters. It is not a case of usurpation and subsequent ratification. It is not a case of request by an agent for ratification of an unauthorized act. It is the
189 request of an agent to those authorized to give the authority for power to act.

However, as to $400,000 of these bonds, no contractual rights can arise, and since the proposition for issuance is single the whole issue must fall.

III.

The allegation of the answer that there is over $100,000 in the treasury of the city applicable to the payment of the city's debts, is futile for the following reasons:

First. Money or assets on hand do not decrease the amount of a debt. There is a line of decisions holding that money on hand or even uncollected taxes, before delinquency, may be offset against indebtedness for current expenses when such money or taxes have been so appropriated. There are no cases holding that money in the treasury can be offset against obligations not due for many years.

Second. This is not a case of determining a net indebtedness to see whether a limit has been passed. The prohibition is that the amount of the bonds issued shall not exceed five per cent. of the assessment.

190 IV.

By section 28 of the charter the council is authorized to provide by ordinance for all matters pertaining to elections not otherwise provided for.

Section 9 of ordinance 790 prescribes certain requirements of notice. The requirements were not in conflict or derogation of any legal requirements, but were supplementary thereto. Being adopted by legal authority they are the law of the election as much as the statute itself. It is admitted that they were not complied with. Since this was a special election, the validity of which is attacked directly, and no rights have intervened this failure to comply with the ordinance in these respects invalidates the election.

Harding *vs.* Rockford R'y Co., 65 Ill., 90.

It is respectfully submitted that the judgment in this case ought to be affirmed.

ALFRED E. BUELL,
Counsel for Respondent.

191 We most respectfully submit that two bad decisions cannot make one good rule or vindicate the truth and the law, and that in all good conscience, reason, and common sense the decision heretofore rendered in this cause on the 29th day of November, 1895, should not be allowed to stand, but this appellant should be granted a rehearing and the decision of the lower court reversed and the cause put to trial upon its merits, as from the errors already pointed out herein it would be violating every principle of law that has been transmitted from age to age if such a decision is allowed to stand.

Wherefore appellant prays that this his said petition be granted for rehearing, and that the decision of the lower court in this cause be reversed.

All of which is most respectfully and sincerely submitted for the calm judgment of this court.

FRANK H. GRAHAM AND
A. R. TITLOW,
Attorneys for Plaintiff and Appellant.

192 Endorsement: 1893. In the supreme court of the State of Washington. John C. Stallcup *vs.* The City of Tacoma. Petition for rehearing. Filed Dec. 16, 1895. C. S. Reinhart, clerk, by R. B. Crandall, deputy. A. R. Titlow, Ben. Sheeks, and Frank H. Graham, attorneys for plaintiff and appellant.

193 In the Supreme Court of the State of Washington.

JOHN C. STALLCUP, Appellant,
vs.
THE CITY OF TACOMA, Respondent. } No. 1893. Judgment.

MONDAY, *January* 13*th*, 1896.

This cause having been heretofore submitted to the court on the transcript of the record of the superior court of Pierce county and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises and having filed its opinion in writing, it is now, on motion of D. J. Crowley, Esquire, of counsel for respondent, considered, adjudged, and decreed that the judgment of the said superior court be, and the same is hereby, affirmed with costs, the petition for rehearing denied, and that the said city of Tacoma have and recover of and from the said John C. Stallcup and from Mary S. Stallcup, Hattie M. Thomas, and John J. Crowley, sureties, the costs of this action, taxed and allowed at forty-seven and $\frac{50}{100}$ dollars, and that execution issue therefor; and it is further ordered that this cause be remitted to the said superior court for further proceeding in accordance with the opinion herein filed.

194 In the Supreme Court of the State of Washington.

JOHN C. STALLCUP, Plaintiff and Appellant,
vs.
THE CITY OF TACOMA, a Municipal Corporation, Defendant and Respondent. } No. 1893. Petition for Writ of Error.

To the honorable the chief justice of the supreme court of the State of Washington:

The petitioner, John C. Stallcup, plaintiff and appellant in the above-entitled action, respectfully shows—

That your petitioner is the plaintiff and appellant in the above-entitled action, and that final judgment therein was rendered, filed, and entered in this court on the 13th day of January, 1896, in and by which judgment the judgment of the superior court of the State of Washington for Pierce county, dismissing the complaint of the petitioner and rendering judgment in favor of the defendant and against your petitioner for costs, was affirmed; that said final judgment rendered by this court in said action was greatly to the prejudice and the injury of your petitioner, which said judgment and the proceedings leading thereto are erroneous in many particulars; that

in said action there was drawn in question a right, privilege, immunity under the constitution of the State of Washington and the Constitution of the United States and the decision was against that right, privilege, and immunity so claimed by said decision of this court; that said petitioner claimed that said defendant and respondent was attempting to take his property without due process of law and by taxation to pay certain invalid and unconstitutional
195 bonds of said city of Tacoma, but that this court decided against the claim of your petitioner.

Wherefore, in order that your petitioner may obtain relief in the premises and have opportunity to show the errors complained of, your petitioner prays that he may be allowed a writ of error in said cause, and that a supersedeas in said cause be allowed your petitioner and the amount of supersedeas bond fixed by this court; that said cause be transmitted to the honorable the Supreme Court of the United States, at Washington, to determine said errors, and that proper orders touching the security required of your petitioner may be made.

And your petitioner will, as in duty bound, ever pray, etc.

A. R. TITLOW,
Attorney for Plaintiff, Appellant, and Petitioner.

Indorsed: No. 1893. Filed January 22d, 1896. C. S. Reinhart, clerk.

196 In the Supreme Court of the State of Washington.

JOHN C. STALLCUP, Plaintiff and Appellant, *vs.* THE CITY OF TACOMA, a Municipal Corporation, Defendant and Respondent.	No. 1893. Order Granting Writ of Error and Fixing Supersedeas Bond.

Now, on this 22nd day of January, 1896, on hearing and reading the petition of John C. Stallcup, the plaintiff and appellant in the above-entitled action, praying for the allowance of the writ of error from the Supreme Court of the United States to the supreme court of the State of Washington, and it appearing by said petition and by the record in the above-entitled cause that said case is a proper case for the allowance of said writ: now, therefore, it is—

Ordered by the undersigned, the chief justice of the supreme court of the State of Washington, that said writ be, and the same is hereby, allowed, and that the said John C. Stallcup execute to the defendant and the respondent herein in said suit his bond, with sureties thereon to be approved by the undersigned, in the sum of five hundred dollars, and said bond, when executed and so approved by the undersigned, shall operate as a supersedeas bond in said action, and thereupon all further proceedings upon the judgment rendered by this court in said action shall be stayed pending the

hearing and determination of said writ of error by the United States Supreme Court.

Dated this 22nd day of January, 1896.

JOHN P. HOYT,
Chief Justice of the Supreme Court of the State of Washington.

197 Endorsement: No. 1893. Filed January 22, 1896. C. S. Reinhart, clerk.

198 UNITED STATES OF AMERICA, *ss*.

The President of the United States to the honorable the judges of the supreme court of the State of Washington, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court of the State of Washington, before you, being the highest court of law or equity in the said State in which a decision could be had in said suit between John C. Stallcup, plaintiff in error, and The City of Tacoma, defendant in error, said judgment having been given and entered on the 13th day of January, 1896, on denial of petition for rehearing in said cause, where a right, privilege, and immunity were claimed under the constitution of the State, and wherein were claimed a right, privilege, and immunity under the Constitution of the United States, and the decision was against the right, privilege, and immunity so claimed, specially set up and claimed, under said Constitutions, *and* manifest error has happened, to the great damage of the said John C. Stallcup, as by his complaint appears, it being fit that the error, if any hath been, should be fully corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, District of Columbia, within sixty days

199 from the date of this writ, in the said Supreme Court, to be there and then held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 23rd day of January, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States the one hundred and twentieth year.

[Seal United States Circuit Court, District of Washington.]

A. REEVES AYRES,
Clerk of the Circuit Court of the United States for the District of Washington.

The above writ of error is hereby allowed.

JOHN P. HOYT,
Chief Justice of the Supreme Court of the State of Washington.

I, John P. Hoyt, chief justice of the supreme court of the State of Washington, do hereby certify that it manifestly appears from the records of that certain action numbered —, heretofore pending in the supreme court of the State of Washington, wherein John
200 C. Stallcup is plaintiff in error and The City of Tacoma is defendant in error, that the plaintiff in error claimed a right, privilege, and immunity under and by virtue of the constitution of the State of Washington and the Constitution of the United States, and that the decision of the said supreme court of the State of Washington, which is the highest court of said State in which a decision in said action could be had, was against the right, privilege, and immunity so claimed by the plaintiff in error, John C. Stallcup—that is to say, plaintiff in error, John C. Stallcup, as appears by the records in the above-entitled action, claimed that the defendant, City of Tacoma, a functionary of the State, in and by the acts set forth and alleged in plaintiff's complaint, was guilty of an arbitrary exercise of the governmental power against the specific restraints laid against it in the premises by the constitution of the State of Washington, and of thereby taking plaintiff's property without due process of law, against the right, privilege, and immunity claimed by the plaintiff under the fourteenth article of amendment of the Constitution of the United States, and that the decision of the supreme court of the State of Washington in the above-entitled cause was against the said claim of right, privilege, and immunity and had the effect of denying to him such right, privilege, and immunity so claimed, and depriving him of his property without due process of law, and I therefore certify that the said plaintiff in error, John C. Stallcup, is entitled to have said action and the final judgment of the supreme court of the State of Washington reviewed by a writ of error in the Supreme Court of the United States, and the foregoing writ of error is accordingly allowed.

201 Witness the Honorable John P. Hoyt, chief justice of the supreme court of the State of Washington, this — day of January, in the year of our Lord one thousand eight hundred and ninety-six.

JOHN P. HOYT,
Chief Justice of the Supreme Court of the State of Washington.

202 We have received a copy and acknowledge service of the within this 23rd day of January, 1896, and waive any further service of the same.

JAMES WICKERSHAM AND
CROWLEY, SULLIVAN & GROSSCUP,
Attorneys for Defendant in Error.

Filed January —, 1896.

—— ——,
Clerk of the Supreme Court of the State of Washington.

203 [Endorsed:] No. 1893. Class ——, dep't ——. In supreme court of the State of Washington. John C. Stallcup, plaintiff in error, *vs.* City of Tacoma, defendant in error. Writ of error. Filed Jan. 25, 1896. C. S. Reinhart, clerk. A. R. Titlow, lawyer, 204 Bank of Commerce building, Tacoma, Washington, attorney for —— ——.

204 In the Supreme Court.

JOHN C. STALLCUP, Plaintiff in Error,
vs.
CITY OF TACOMA, Defendant in Error. } Bond.

Know all men by these presents that John C. Stallcup and Philip L. S. Reese, John W. Kleeb are held and firmly bound unto the City of Tacoma, of the county of Pierce, State of Washington, in the sum of five hundred dollars, to be paid to the said City of Tacoma, its successors or assigns; for the payment of which, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 23rd day of January, 1896.

Whereas the above-named John C. Stallcup has sued out a writ of error from the supreme court of the State of Washington to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Washington and desires a stay of proceedings on said judgment:

Now, therefore, the condition of this obligation is such that if the above-named John C. Stallcup shall prosecute his said writ of error to effect and answer all costs and damages if he shall
205 fail to make good his plea, then this obligation is to be void; otherwise to remain in full force and virtue.

JOHN C. STALLCUP. [SEAL.]
L.
PHILIP [S.]* REESE. [SEAL.]
JOHN W. KLEEB. [SEAL.]

STATE OF WASHINGTON, } *ss:*
County of Pierce, }
L.

Philip [S.]* Reese and John W. Kleeb, being first duly sworn, each for himself says that he is over the age of twenty-one years, a citizen of the United States, and is a freeholder of Pierce county, Washington, and is not an attorney-at-law nor an officer of the court, and is worth, in his own separate right, the amount specified in the foregoing bond over and above all just debts and liabilities and property exempt from execution.

L.
PHILIP [S.]* REESE.
JOHN W. KLEEB.

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* [Erased in copy.]

Subscribed and sworn to before me this 23rd day of January, 1896.

JOHN A. PARKER, [SEAL.]
Notary Public in and for said State, residing at Tacoma, Pierce County, Washington.

206 Endorsement: No. 1893. In the supreme court of the State of Washington. John C. Stallcup, plaintiff in error, *vs.* City of Tacoma, defendant in error. Bond. Filed Jan. 25, 1896. C. S. Reinhart, clerk. A. R. Titlow, lawyer, 204 Bank of Commerce building, Tacoma, Washington, attorney for plaintiff.

The within bond and the sureties therein named approved this 25th day of January, 1896, by me—

JOHN P. HOYT,
Chief Justice of the Supreme Court of the State of Washington.

207 In the Supreme Court of the United States.

JOHN C. STALLCUP, Plaintiff in Error,
vs.
CITY OF TACOMA, Defendant in Error. } Petition in Error.

Said John C. Stallcup, plaintiff, complains of said City of Tacoma, defendant, for that the said city of Tacoma, at the December term of the supreme court of the State of Washington, A. D. 1895, recovered a judgment by the consideration of said court against the said plaintiff in a certain action then pending in said court, wherein the said John C. Stallcup was plaintiff and appellant and the said City of Tacoma was defendant and respondent, a copy of the record of the judgment and proceedings in which action, duly certified, is hereto attached, marked "A," and made a part of this petition; and the said John C. Stallcup avers that there is error in the said record and proceedings, in this, to wit:

I.

The court having original jurisdiction of said cause erred in sustaining the demurrer of the defendant city to plaintiff's complaint and giving judgment thereon against plaintiff, because in the premises the defendant city, a functionary of the State, in and by the acts set forth in the plaintiff's complaint was guilty of an arbitrary exercise of governmental powers against the specific restraints laid against it in the premises by the constitution of the State,
208 and thereby taking the plaintiff's property without due process of law.

II.

Said supreme court of the State erred in giving its judgment of affirmance thereof, in that it thereby sustained said arbitrary acts of the city, a functionary of the State, in denying due process of law to plaintiff and in the taking of his property in violation of

the specific restraints laid against the defendant city in the premises by the constitution of the State.

III.

The supreme court of the State erred in its said judgment affirming the judgment of said court of original jurisdiction and in giving its judgment against the plaintiff, and that thereby it sustained the acts of the defendant city, a functionary of the State, in taking the property of plaintiff without due process of law.

IV.

The said supreme court of the State erred in giving said judgment, because in and by said judgment plaintiff is denied the relief and protection guaranteed to him by the fourteenth article of amendment to the Constitution of the United States.

V.

The supreme court of the State in and by its said judgment deprived plaintiff of his property without due process of law and likewise denied him the relief and protection guaranteed by the fourteenth article of amendment to the Constitution of the United States.

209 VI.

That the said judgment was given for the said defendant, City of Tacoma, when it ought to have been given for the said plaintiff according to the law of the land.

Said John C. Stallcup, plaintiff, therefore prays that the said judgment may be reversed and the plaintiff restored to all things he has lost by reason thereof.

E. O. WOLCOTT AND
JOHN F. SHAFROTH AND
A. R. TITLOW,
Attorneys for Plaintiff in Error.

Endorsement: No. 1893. In superior court of the county of Pierce, State of Washington. John C. Stallcup, plaintiff in error, *vs.* City of Tacoma, defendant in error. Petition in error. Assignments of error. A. R. Titlow, lawyer, 204 Bank of Commerce building, Tacoma, Washington. Filed Jan. 25, 1896. C. S. Reinhart, clerk.

210 UNITED STATES OF AMERICA, *ss:*

To the City of Tacoma, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, D. C., on or before the 23d day of March, 1896, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Washington, wherein John C. Stallcup is plaintiff in error and you are defendant in error, to show cause, if any

there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to parties in that behalf.

Witness the Honorable John P. Hoyt, chief justice of the supreme court of the State of Washington, this 25th day of January, in the year of our Lord one thousand eight hundred and ninety-six.

[Seal of the Supreme Court, State of Washington.]

JOHN P. HOYT,
Chief Justice of the Supreme Court of the State of Washington.

Attest my hand and the seal of said court this 25th day of Jan., A. D. 1896.

C. S. REINHART, *Clerk.*

211 We have received a copy and acknowledge service of the within this 29 day of January, 1896.

EDWARD S. ORR, *Mayor of Tacoma.*
JAMES WICKERSHAM AND
CROWLEY, SULLIVAN & GROSSCUP,
Attorneys for Defendant.

212 [Endorsed:] No. 1893. Class —, dep't —. In superior court of the county of Pierce, State of Washington. John C. Stallcup, plaintiff in error, *vs.* City of Tacoma, defendant in error. Citation. Filed Jan. 31, 1896. C. S. Reinhart, clerk. A. R. Titlow, lawyer, 204 Bank of Commerce building, Tacoma, Washington, —— ——, attorney for ——.

213 In the Supreme Court of the State of Washington.

JOHN C. STALLCUP, Plaintiff in Error,
vs.
THE CITY OF TACOMA, Defendant in Error. } No. 1893. Certificate & Return.

I, C. S. Reinhart, clerk of the supreme court of the State of Washington, hereby certify that the above and foregoing is a full, true, and correct transcript of the record of the above-entitled cause, and that in pursuance of the writ of error filed herein I herewith transmit said transcript, together with the original writ of error and the original citation, to the Supreme Court of the United States.

Seal of the Supreme Court, State of Washington.

In testimony whereof I hereunto set my hand and the seal of said court, at Olympia, Washington, this 6th day of February, A. D. 1896.

C. S. REINHART, *Clerk.*

Endorsed on cover: Case No. 16,195. Washington supreme court. Term No., 905. John C. Stallcup, plaintiff in error, *vs.* The City of Tacoma. Filed February 19th, 1896.

165-719

Office Supreme Court, U. S.
FILED
AUG 29 1896
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 450.

JOHN C. STALLCUP, PLAINTIFF IN ERROR,

vs.

THE CITY OF TACOMA.

MOTION TO DISMISS.

BENJAMIN S. GROSSCUP,
Attorney for the Defendant in Error for the Purposes of this Motion.

D. J. CROWLEY,
JAMES WICKERSHAM,
P. C. SULLIVAN,
Of Counsel.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 450.

JOHN C. STALLCUP, PLAINTIFF IN ERROR,

vs.

THE CITY OF TACOMA, DEFENDANT IN ERROR.

MOTION TO DISMISS.

Comes now the defendant in error, by its counsel appearing in that behalf, and moves the Court to dismiss the writ of error in the above-entitled cause for the following reasons:

I.

That there is no Federal question arising on the record filed in this Court.

II.

No Federal question arose in the trial court or in the supreme court of the State of Washington, and no Federal question was necessarily involved in the judgment of the court below.

III.

The error, if error there was, was in interpreting and construing the constitution and statutes of the State of Wash-

ington and in determining the force and effect of certain judgments and decisions rendered by the supreme court of the State of Washington.

IV.

It does not appear affirmatively that a Federal question was presented for decision in the supreme court of the State of Washington, or that its decision was necessary to the determination of the cause, or that it was actually decided, or that the decision or judgment rendered could not have been given without deciding it; but, on the contrary, it affirmatively appears that the highest court of the State of Washington decided against plaintiff in error upon an independent ground not involving a Federal question and broad enough to support the judgment.

BENJAMIN S. GROSSCUP,
Attorney for Defendant in Error
for the Purposes of This Motion.

D. J. CROWLEY,
JAMES WICKERSHAM,
P. C. SULLIVAN,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1896.

JOHN C. STALLCUP, *Plaintiff in Error,*
vs.
THE CITY OF TACOMA, *Defendant in Error.*
} File Number 16195.

Notice.

Messrs. E. O. WOLCOTT, JOHN F. SHAFROTH, and A. R. TITLOW, *Attorneys for Plaintiff in Error:*

Please take notice that on Monday, the 12th day of October, A. D. 1896, at the opening of the Court or as soon

thereafter as counsel can be heard, a motion, of which the foregoing are copies, will be submitted to the Supreme Court of the United States for the decision of the said Court thereon.

Affixed hereto is a copy of the brief of argument to be submitted with said motion in support thereof.

BENJAMIN S. GROSSCUP,
Attorney for the Defendant in Error for the Purposes of This Motion.

D. J. CROWLEY,
JAMES WICKERSHAM,
P. C. SULLIVAN,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1896.

JOHN C. STALLCUP, *Plaintiff in Error,*
vs.
CITY OF TACOMA, *Defendant in Error.*

STATE OF WASHINGTON,
County of Pierce, } *ss:*

A. G. Avery, being first duly sworn, deposes and says that he is and at the dates hereinafter mentioned was a citizen and resident of the State of Washington, over the age of twenty-one years and not interested in the above action and competent to be a witness therein; that on the 22d day of August, 1896, at the city of Tacoma, in said county of Pierce, State of Washington, he served a copy of the annexed notice and motion to dismiss the writ of error in the Supreme Court of the United States and a copy of the brief in support of said motion to dismiss upon A. R. Titlow, one of the attorneys for plaintiff in error, by then and there delivering to said A. R. Titlow, at said time and place, a copy of said notice of motion, a copy of said motion, and three copies of

the brief on said motion to dismiss, and that said A. R. Titlow then and there acknowledged service of the same.

A. G. AVERY.

Subscribed and sworn to before me this 22d day of August, A. D. 1896.

[SEAL.] GEO. T. REID,
Notary Public, Residing at Tacoma,
Pierce County, Washington.

Service of the foregoing motion and notice admitted at Tacoma, Washington, by receipt of copies thereof, this 22d day of August, 1896.

A. R. TITLOW,
One of the Attorneys for Plaintiff in Error.

[Endorsed:] Case No. 16,195. Supreme Court United States, October term, 1896. Term No., 450. John C. Stallcup, plaintiff in error, *vs.* The City of Tacoma. Motion to dismiss, with notice, and proof of service of same. Filed August 29, 1896.

165-719

165-719

Office Supreme Court, U. S.
FILED
AUG 29 1896
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1896.

JOHN C. STALLCUP, *Plaintiff in Error,*

vs.

THE CITY OF TACOMA, *Defendant in Error.*

450.

IN ERROR FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF AND ARGUMENT of Defendant in Error on Motion to Dismiss

BENJAMIN S. GROSCUP,
Attorney for Defendant in Error.

D. J. CROWLEY, JAMES WICKERSHAM, P. C. SULLIVAN,
Of Counsel.

ALLEN & LAMBORN, PRINTERS, TACOMA.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1896.

JOHN C. STALLCUP,
Plaintiff in Error,
vs.
THE CITY OF TACOMA,
Defendant in Error.

File No. 16195.

Brief of Defendant in Error on Motion to Dismiss.

STATEMENT.

This action was originally brought by the plaintiff in error, a citizen and tax-payer of the City of Tacoma, for himself and all others similarly situated, against the defendant in error to enjoin it from paying the interest on 1750 negotiable interest bearing bonds of the denomination of One Thousand Dollars each. Said bonds having been issued by the defendant in error, and sold and delivered to C. B. Wright and to the Tacoma Light & Water Company, a corporation. A demurrer was sustained to the second amended complaint and plaintiff in error electing to stand on said

pleading appealed to the Supreme Court of the State of Washington, where said judgment was affirmed. A writ of error was then sued out to this Court, and the defendant in error appeared and moves to dismiss said writ of error for the reasons following :

I.

That there is no Federal question arising on the record filed in this Court.

II.

No Federal question arose in the trial court or in the Supreme Court of the State of Washington, and no Federal question was necessarily involved in the judgment of the Court below.

III.

The error, if error there was, consisted in interpreting and construing the Constitution and Statutes of the State of Washington, and in determining the force and effect of certain judgments and decisions rendered by the Supreme Court of the State of Washington.

IV.

It does not appear affirmatively that a Federal question was presented for decision in the Supreme Court of the State of Washington, or that it was actually decided, or that the decision or judgement rendered could not have been given without deciding it, but on the contrary it affirmatively appears that the

highest court of the State of Washington decided against plaintiff in error upon an independent ground not involving a Federal question and broad enough to support the judgment.

The second amended complaint is to be found at page 2 of the record, and the demurrer thereto at page 24.

ARGUMENT ON MOTION.

The statutes of the State of Washington require that all decisions of the highest court shall be in writing, stating the ground of the decision, and shall be recorded. This Court may in determining its jurisdiction examine such written and recorded opinions to ascertain the grounds of the judgment of the state court.

Dibble vs. Bellingham Bay Land Co., 16 Supreme Court Reporter, 939.

Point I.

This Court will not entertain jurisdiction on writ of error where a Federal question and a local question have been decided in Court below and the local question is sufficient to sustain the decision.

The decision in this case in the Supreme Court of the State of Washington is reported in 13 Washington at page 141. It has been settled by many decisions that a judgment of the highest court of a state will not be reviewed by the Supreme Court of the United

States, if it involve the determination of a question not Federal, which is sufficient in itself to sustain the judgment, although a Federal question may also have been raised and decided.

Dibble vs. Bellingham Bay Land Co., 16 Supreme Court Reporter, 939.

New Orleans vs. N. O. Water Works Co., 142 U. S., 79.

Bacon vs. State of Texas, 16 Supreme Court Reporter, 1023.

Seneca Nation vs. Christy, 162 United States, 283.

Rutland Railroad Co. vs. Cent. Vt. Railroad Co., 159 United States, 630.

Eustis vs. Bolles, 150 United States, 361.

Chouteau vs. Gibson, 111 United States, 200.

Hale vs. Akers, 132 United States, 554.

Johnson vs. Risk, 137 United States, 300-306.

California Powder Works vs. Davis, 151 United States, 389-393.

The grounds of demurrer to the second amended complaint were as follows:

1—That plaintiff has no legal capacity to sue.

2—That there is a defect of parties defendant.

3—That the complaint does not state facts sufficient to constitute a cause of action.

The defendant in an action under the laws of the State of Washington is permitted to demur to a complaint on these grounds.

2 Hill's Code, Sec. 189.

It is further provided by Section 190 of 2 Hill's Code of the State of Washington, as follows:

"The demurrer may specify the grounds of objection in the statutory language of Section 189, or the grounds may be distinctly specified * * * "

The demurrer interposed in this case was based upon this statutory provision.

Point II.

The questions decided in state court are purely local, involving construction of the state constitution, state statutes, charter of the City of Tacoma and regularity of proceedings in relation to bond issue under local state law. Also question of non-joinder of parties defendant. A question of practice under state procedure. No Federal question was involved or decided.

An examination of the opinion of the Supreme Court of the State of Washington shows that one of the questions decided was as to the validity of a certain election authorizing the issuance of the bonds, the payment of which was sought to be restrained. For the third time in this particular case the validity of this election came before the Supreme Court for determination. The first case was that of Seymour vs. City of

Tacoma, reported in 6th Washington, 138, and the second between the same parties, reported in 6th Washington, 427. These decisions are alleged in the amended complaint of plaintiff in error, and their effect sought to be avoided by pretended allegations tending to show that these cases were collusive. The Supreme Court of the State of Washington in relation to these matters held that it would take judicial notice of its records and of what issues were presented for determination by the record in a given case. That it would not consider an allegation of a complaint that certain questions were not presented for determination upon appeal in another action when it appeared from an inspection of its own records that such allegation was unfounded. It also determined that a decision of the Supreme Court determining the legality of municipal bonds in an action by a taxpayer on behalf of himself and all others similarly situated to restrain the city from issuing bonds was in the absence of fraud or collusion conclusive of their validity in a subsequent action by another tax payer, especially where it appears that the same questions involving the legality of the bonds were presented in both actions. No Federal question is presented thus far. The Supreme Court construed the effect of its own decisions, and the effect of those decisions as effecting the present action. These were questions of general jurisprudence, and of the effect of a state judgment.

In the case of

Newport Light Co. vs. Newport, 151 United States, 528-538

in speaking of a kindred question this Court said:

"The court of appeals of Kentucky had an undoubted right to construe its own decision rendered in the case of the Newport Light Company against the City of Newport, and the Duever Company, and to declare what the judgment rendered therein really meant, and to define the scope thereof."

This neither raised nor presented any Federal question whatever.

Adams vs. Louisiana, 144 United States, 651.

Sage vs. Louisiana, 144 United States, 647.

The Supreme Court of the State of Washington under the allegations of the amended complaint decided that the plaintiff in error was estopped from maintaining the present action by reason of former adjudications, and examined these former adjudications, being part of its own record, for the purpose of determing what if any questions were involved therein, and whether the questions so involved and decided were of such a character as to conclude the plaintiff in error in the present action.

Another question decided by the Supreme Court involved the right to vote in that state at an election. This involved the construction of the Constitution of the State of Washington and the Statutes thereof in relation to registration. It has been held by this Court that in questions upon the construction of the Constitution and laws of a state this Court as a general rule follows the decisions of the highest court of the

state, unless they conflict with, or impair the efficacy of some provision of the Federal Constitution, or of a Federal Statute, or involve a rule of general commercial law.

Gormley vs. Clark, 734 United States, 338-348.

What the provisions of the state Constitution in relation to the registering of voters meant, what it required, what was necessary to be done in order to constitute a valid election, whether such election was or was not valid, what the effect of the election was as applied to the bonds in question, were all essentially questions of local state law involving the construction of its Constitutional and statutory provisions made in due course of law. They present no Federal question which can be examined here.

Marchant vs. Penn. Railroad, 153 United States, 380.

Ludeling vs. Chaffe, 143 United States, 301.

Norton vs. Shelby County, 108 United States, 425-439.

Gillis vs. Stinchfield, 159 United States, 658.

Claiborne County vs. Brooks, 111 United States, 400.

Rich vs. Mentz, 134 United States, 632-644.

The mere statement contained in the amended complaint to which the demurrer was sustained that the property of plaintiff in error was being taken without due process of law does not necessarily present

a Federal question. In connection with such statement facts must be presented which of themselves show a violation of this constitutional provision. No such facts are alleged in the amended complaint. No provision of the State Constitution of statute law or charter provision is pleaded as being in violation of this provision of the Federal Constitution. It is not shown that the property of plaintiff in error was or is about to be taken without due process of law. At most the facts stated show that a tax is liable to be imposed and collected for the payment of the principal and interest on certain bonds issued by the City of Tacoma. These bonds, according to the decision of the Supreme Court of that state, were duly issued in accordance with the charter provisions of the City of Tacoma and the statute law of the State of Washington. The irregularities which plaintiff in error claims make the bond issue void occur by reason of a failure to follow what he claims are certain constitutional and statutory requirements of the State of Washington. The Courts of that state have decided in this case that the bonds were not issued in violation of such law. Upon this question plaintiff in error has been heard in accordance with the laws of the forum he sought and where he resides. The decision apparently was not in accordance with his notions of law, but this fact does not confer jurisdiction upon this Court. If it did every case involving a question of property decided by a state court could be taken here by a dissatisfied suitor.

The Supreme Court also held that the amended complaint in this action did not charge such fraud in relation to what is known as the Seymour cases as would operate to defeat the binding effect of the decisions rendered therein, and held the allegations of the complaint upon this matter wholly insufficient, and especially so when considered in connection with what was disclosed by the records of that Court.

Stallcup vs. Tacoma, 13 Washington, 148.

This was a decision on the pleading itself, and upon the sufficiency of its allegations, a question of practice, of purely local concern, and upon which the decision of the state court is necessarily final. It also held there was a misjoinder of parties defendant, and that for this reason the demurrer to the amended complaint was properly sustained in the Court below. That the bonds were negotiable in character, and their validity could not be determined in the absence of the holders thereof. This was a distinct independent question, sufficient in itself to determine the cause. It was a question of state practice, arising upon a complaint filed in the state court.

We contend that the allegations of the complaint that the plaintiff in error has been deprived or is about to be deprived of its property without due process of law, are altogether insufficient. He does not show in what way he has failed to be allowed the benefit of due process of law.

It has been held by this Court that

"The Fourteenth Amendment of the Constitution in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided. * * * Whether the court of last resort of a state has properly construed its own Constitution and laws in determining that the summary process under those laws was applicable to the matter which was adjudged, is purely a decision of a question of state law binding upon this Court."

Iowa Central Railway Company vs. Iowa, 160 United States, 389.

Corry vs. Campbell, 154 United States, 629.

It is not distinctly alleged any where in the amended complaint in what respect plaintiff in error failed to secure the benefits of due process of law. He had an opportunity to be heard and was heard. The decision was against what he conceived to be his rights. No man has a constitutional right to be heard in any particular forum. Due process of law means law in its regular course of administration through courts of justice. It never has been held to confer upon a litigant any other right than the right to be heard and determined according to the legal course of procedure of the particular community in which he lives.

Hurtado vs. California, 110 United States, 516-527.

Leeper vs. Texas, 139 United States, 462-168.

This Court will determine for itself whether or not a Federal question has been presented and determined in the Court below, independent of the certificate of the presiding judge. The object of that certificate is to make more certain and specific what is too general and indefinite in the record, but it cannot originate a Federal question.

Dibble vs. Bellingham Bay Land Company, 16 Supreme Court Reporter, 939.

Newport Light Co. vs. Newport, 151 United States, 527.

Therefore in support of this motion to dismiss defendant in error contends,

FIRST—That no Federal question was involved in the decision of the Supreme Court of the State of Washington.

SECOND—That if such Federal question was involved and decided there was also involved therein the determination of a question not Federal, sufficient in itself to sustain the judgment.

Should this Court find it unnecessary to decide any Federal question, and decide that the state Court based its decision upon a local or state question, this writ of error should be dismissed. Although there has been some discrepancy in the manner of entering judgments in such cases, this has been settled to be the best practice.

Eustis vs. Bolles, 150 United States, 361-370.

Bauserman vs. Blunt, 147 United States, 647-654.

BENJAMIN S. GROSSCUP,
Attorney for Defendant in Error for the purposes of this motion.

D. J. CROWLEY,
JAMES WICKERSHAM,
P. C. SULLIVAN,
Of Counsel.

165-719

165-719

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JAMES H. MCKENNEY,
CLERK

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1896.

JOHN C. STALLCUP, *Plaintiff in Error*,

vs.

450

THE CITY OF TACOMA, *Defendant in Error.*

IN ERROR FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

Brief and Argument of Plaintiff in Error Against Defendant's Motion to Dismiss.

E. O. WOLCOTT,
JOHN F. SHAFROTH,
A. R. TITLOW,
For Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1896.

JOHN C. STALLCUP,
Plaintiff in Error,

vs.

THE CITY OF TACOMA.
Defendant in Error.

No. 450.

Brief and Argument of Plaintiff in Error Against Defendant's Motion to Dismiss.

In the conception of counsel for defendant City, there is no federal question presented in this case, and in accord therewith they have moved to dismiss the case

It is believed that this is a misconception of the case, and that the motion should be denied, for these:

FIRST.

The federal question of due process of law in this case is involved in and arises out of the question: Was the $1,750,000 bond transaction with C. B. Wright—such

as it was—one within the powers of the defendant City? If within its powers the bonds are valid and the transaction one of due procedure. If not they are void—and constitute no warrant for the tax levy taking of property to pay them, and such taking being the result thereof is not by due process of law.

The defendant City being a creature of the State, vested with certain governmental powers, deprives the plaintiff of his property, in and by the arbitrary and unrestrained exercise thereof.

By the Fourteenth Article of the amendment of the Constitution we have a guaranty of protection here, against such wrongs, which guaranty was duly invoked in and by the complaint of plaintiff.

In the case of Scott vs McNeal, 14 Sup. Ct. Rep., 1112, the court say:

"The Fourteenth Article of the amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains: 'Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.' These prohibitions extend to all acts of the State whether through its legislative, its executive or its judicial authorities, repeating the words of Mr. Justice Johnson in Bank vs. Oakley * * * was intended 'to secure the individual from the arbitrary exercise of the power of government unrestrained by the established principles of private rights and distributive justice.' "

There were some allegations in the complaint not

strictly within the premises touching the question of *power* in the defendant City, but as will be seen they were not considered by the State court and will not be considered here.

The defendant City answered the allegations of the complaint by demurrer, as follows:

"1st. That the plaintiff has no legal capacity to sue.

"2d. That there is a defect of parties defendant.

"3d. That the complaint does not state facts sufficient to constitute a cause of action."

This demurrer being sustained and plaintiff standing by his complaint judgment was given against him, and the same was duly appealed and reviewed by the Supreme Court of the State.

That court considered only those allegations of the complaint showing the want of due process of law, charging and showing that the city acted without authority in the premises.

After considering the allegations upon which this question rested, that court held that the city acted within its powers and that the bonds were therefore valid, and accordingly affirmed the judgment and expressly refused to consider the other allegations of the complaint. See page 152 of 13 Wash. Rep.

That court recognized the presence of the federal question of due process of law, considered it and decided it on its merits against the plaintiff. Then duly

certified the fact, that the question might be brought here for the consideration of this court.

The case is here for that purpose, with that single question stated and presented by the complaint of plaintiff, and with that single question continuously urged and argued in every step and brief of the case, with the same so recognized, considered and certified by the Supreme Court of the State. In the nature of the question, and in accord with the views of this court, stated in the case of Arrowsmith vs. Hamoring et al., 6 Sup. Ct. Rep., 1023, it would seem that this motion should be denied. As to how much or how little of merit there is in this federal question here presented, is matter not within the scope of this motion, and we might with due propriety stop here.

SECOND.

Inasmuch as counsel have gone further in their brief and argument in support of this motion, we will briefly refer to the character of the case as shown by the complaint.

The defendant City being a municipality, created and existing under and by virtue of the provisions of the Constitution of the State, was by that Constitution specifically limited in its powers touching the identical matter of these bonds issued and delivered to C. B. Wright, and in three certain particulars :

1st. The purpose of such debt liability was limited to a water supply in connection with sewers and light.

2d. The amount of such liability was limited to a five per centum.

3d. The authority and power to incur such liability were still further conditioned and limited to the assent of the electors expressed at a lawful election held for that purpose, viz.: by registration as provided in the Constitution. Sections 6 and 7 of Art. VI. and Sec. 6 of Article VIII.

The complaint shows these and shows that the city in this bond transaction acted not within these limits at all, but entirely outside of each and every of them, especially in these:

1st—There was not any water nor the right to any water constituting the subject or purpose of the liability attempted to be incurred, nor was any water or right to water acquired in and by the transaction.

2d. The amount of the liability thereby attempted to be incurred was far in excess of the five per cent. limitation.

3d. The election held for the assent of the electors was lawless and purposely in violation of the constitutional requirement of registration of the electors; and but for such lawlessness not even a semblance of assent could or would have been obtained.

4th. The bonds were not sold for money at all, but were traded to Wright, not for a water supply, but for a wooden flume, some pipes, arch lights and real estate.

(5th. C. B. Wright was a guilty party to it all, and still holds the bonds.

These allegations touching the fraud of Wright were not considered by the court because Wright was not a party defendant, and because they were not pertinent to the question of power in the city.)

THIRD.

Touching the decisions of the Supreme Court of the State affecting by construction any of the said constitutional provisions referred to, it will be seen by an examination of such decisions that in every instance that court had construed the same in accord with plaintiff's contention here; that in no case has there been any construction of or reference to the provision of the Constitution limiting the purpose of such debt liability to a water supply, sewers and light. Referring to the collusive case of Seymour vs. The City, in which the parties thereto had a legislative enactment construed by the Supreme Court of the State and immediately used this construction as a license to them to hold a lawless election in violation of the Constitution, in order to give color to the city's unrestrained assault on the private rights of the property holders of the city: We can only say that such decision will not be accepted as one construing the constitutional provision requiring a registration of the electors to constitute a lawful election, because the said constitutional provision was never referred to in the record of the case nor in the opinion of the court given in the case. And even in the decision brought here in this case the Supreme Court still concedes that this election was of those requiring registration; but three excuses are given therein

for refusing to respect the provision :

1st. That the provision is a dead letter till a certain kind of legislation is enacted.

2d. That there is another provision of the Constitution in conflict with it.

3d. That the provision is absurd.

Touching the first, it will be observed that the court claimed little or nothing for it, and recognizing that it was without force proceeded to state the other two.

That in so doing the court overlooked the fact that there was no sort of inconsistency nor conflict in the two constitutional provisions referred to, and likewise should have seen that there was nothing absurd in the provision, in view of the fact that the new State with its Constitution, first legislature and other officials, was launched under the Enabling Act of Congress; and that the first legislature had enacted a sufficient registration law for all elections; including this election for the assent of the electors to this debt liability; and such is and was the statutory law; notwithstanding the decision in the said case of Seymour vs. the defendant City, because that case was collusive and fraudulent, and the decision therein procured is of no binding effect anywhere.

Town of Andes vs. Ely, 15 Sup. Ct. Rep., 954.

This court has never accepted nor adopted the views of the Supreme Court of the State when they are destructive instead of constructive, nor when they stand

opposed to the established principles of private rights and distributive justice.

If the court cares to look further into the character and merits of the case at this time, we respectfully refer to our brief on the merits which we had filed before this motion was made. This brief contains index and marginal references to the printed record.

E. O. WOLCOTT,
JOHN F. SHAFROTH,
A. R. TITLOW,
For Plaintiff in Error.

165-719

Office Supreme Court, U. S.
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JUL 27 1896
JAMES H. McKENNEY,
Clerk.

165-719

Supreme Court of the United States

JOHN C. STALLCUP,
Plaintiff in Error.

vs.

THE CITY OF TACOMA,
Defendant in Error.

File No. 16195.

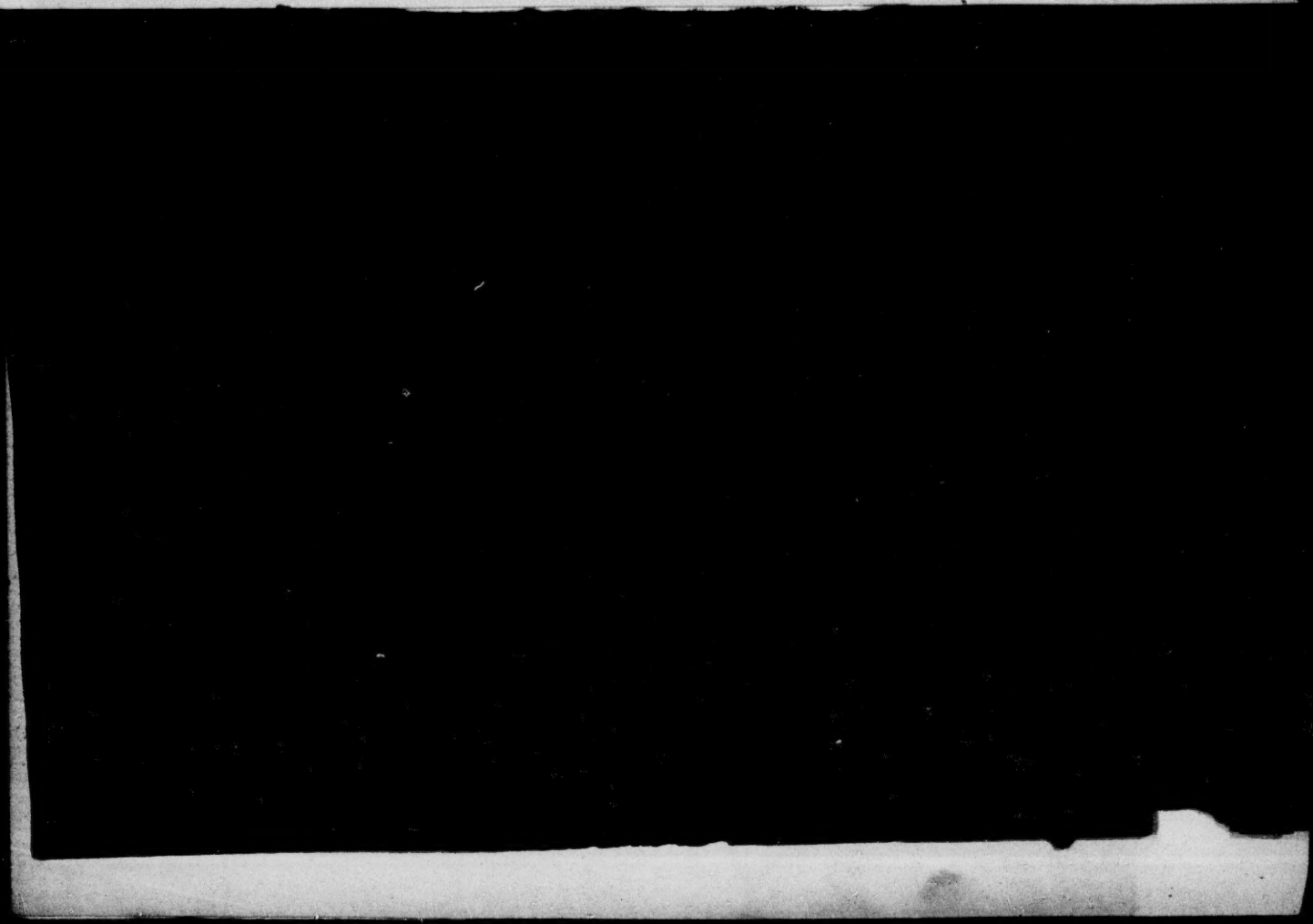
No. ~~905, Oct. Term, 1895.~~ 450

Brief of Plaintiff.

BRIEF FOR PLAINTIFF IN ERROR.

E. O. WOLCOTT,
JOHN F. SHAFROTH,
A. R. TITLOW,
Attorneys for Plaintiff in Error.

Harlow & Thomas, Printers, Tacoma, Wash.



IN THE

Supreme Court of the United States

JOHN C. STALLCUP,
Plaintiff in Error.

vs.

THE CITY OF TACOMA,
Defendant in Error.

File No. 16195.

No. 905, Oct. Term, 1895.

Brief of Plaintiff.

STATEMENT.

The plaintiff in error here was plaintiff in the original action.

In his bill of complaint he prayed an injunction against the collection of a specific tax levy made and levies to be made by the defendant city for the specific purpose of paying the interest and principal on one thousand seven hundred and fifty bonds of the city, of one thousand dollars each, aggregating the sum of one million seven hundred and fifty thousand dollars principal and a like sum additional as interest. The said bonds being held by one C. B. Wright as a result of a barter and trade finale to the lawless proceedings described in the complaint.

In his complaint the plaintiff also shows that the

The marginal figures in this brief are to the same paging

proceedings in the matter of said bonds and the said tax levies for the payment thereof on the part of the defendant city are and were in the exercise of the power of government, as a functionary of the state, and were and are arbitrary, and in violation of the established principles of private rights and the specific restraints laid by the Constitution of the State, and that thereby the plaintiff and the other taxpayers of the city are being deprived of their property without due process of law.

pages 2 & 23

And in his complaint he specifically invokes the protection promised by the fourteenth article of the amendments to the Constitution of the United States.

page 8

The judgment of the Superior Court of the State, in and for the County of Pierce, being the Court of original jurisdiction, sustained defendant's demurrer to the said complaint, and the plaintiff electing to stand and abide by the said complaint, judgment was given there against him. Whereupon he appealed to the Supreme Court of the State, which Court gave its judgment of affirmance thereon, and the case comes here on the writ of error to that Court.

page 207-208

The errors assigned to that judgment and the allegations of the said complaint are fully set forth in the printed abstract of the record.

The grounds of demurrer to said complaint were as follows:

1. That plaintiff has no legal capacity to sue.
2. That there is a defect of parties defendant.
3. That the complaint does not state facts sufficient to constitute a cause of action.

We will make but brief reference to these specific questions here.

CAPACITY TO SUE.

It has been claimed that the city alone by its officers charged with such duties can maintain an action in court based upon the invalidity of this pretended contract.

In a certain sense that is true. Only the city could maintain an action to rescind the contract or for damages for its breach, and to its officers is committed the discretion as to whether such action shall be instituted. But the question here is different. The direct wrong complained of is that the city, by its officers, is making the tax levies and thus taking the property of the property owners for the payment of a pretended debt which has no legal existence, and to the injury of the taxpayer.

This wrongful levy, collection and diversion of the substance of the taxpayer is the real question, the pretense upon which the city would pay it out is not the gist of but only an incident to the action. The relief, if granted, will be no adjudication binding those who have claims against the city. The result would be to compel those holding these bonds to come into court and establish their validity.

The direct injury to the plaintiff is not by such party making the claim, but by the city levying, collecting and paying out such funds unlawfully, to the damage of the taxpayer.

To say that he has no standing in court to prevent such an injury would be not only contrary to the prin-

ciple that when there is a wrong there is a remedy, but would also be contrary to established authority.

It has been said "The perfection of law is to have a clear and definite remedy for every injury that can be sustained." This, of course, means a legal injury and remedy in and by the court.

The following authorities in addition to the established practice in the State of Washington show that a taxpayer may maintain an action of this character:

High on Injunction, chap. 22, 3d ed.
Rice vs. Smith, 9 Iowa, 570.

DEFECT OF PARTIES.

But if inability to bring the holder of these bonds within the jurisdiction of the court could defeat the action then there would be no remedy.

It has some times been a rule of pleading that if objection was taken that proper parties had not been joined the party making the objection should point out who the parties were and show them to be within the jurisdiction of the court. The reason for this rule has not ceased with its practice. The substance of the law remains, which is that the court will not deny a remedy by reason of the inability to bring before it all who might be incidentally affected or who might be proper parties.

It appearing here that the holder of these bonds is not within the jurisdiction of the court, and the court knowing there is no legal power to serve him with binding process, it will proceed to determine such rights as

may be determined between the parties directly concerned, the one who is threatened with an injury, the other who threatens it.

THE CAUSE SHOWN BY THE COMPLAINT.
BONDS VOID FOR WANT OF REGISTRATION ELECTION.

There are people deeply read in newspaper law who do not take favorably to the notion that the exercise of power by the people should be limited and prescribed to the manner and form previously fixed by written law. But to the lawyer, the jurist and the Court, if understood as attempting by its action to affect legal rights, there is still truth in the saying that "a multitude though composed of Newtons must still be a mob."

An able exposition of the doctrine showing the necessity of the people keeping within the limits of and following the mode fixed by law in the attempt to exercise power, will be found in Mr. Webster's speech in the case of the Dorr Rebellion. A great lover of that liberty which is protected by written law, he had there a subject in which he delighted and his argument ever deserves the attention of the lawyer and the court.

From the standpoint of the lawyer the protection of legal rights and privileges by written constitutions is the most perfect fruit produced by the efforts of man in all the ages. It has almost come to be to civil liberty what sunlight is to the animate universe. But the fact remains that what was created by man must still be sustained and supported by his efforts. The one ever present danger to its existence is, that like sunlight, it shall become so common that man will fondly imagine it will go on forever without effort on his part.

It is not only the privilege but the duty of every citizen to stand upon his legal rights and defend them against every unlawful attempt at the exercise of power, for thus he is defending not only his property but the very life principles of our government.

And to the Court the same duty remains to enforce the right whether the infringement be slight or gross, whether the party or cause be powerful and popular or otherwise.

If, therefore, it be true that for any reason the proposed election touching the issuance of these bonds, was not, could not be a legal election, no one was called upon to take part in it. No one is affected by its results.

Prior to the second Seymour case, 6 Wash. 427, all had the right to rely and depend upon it that the taxpayer could know that the proposition was to authorize an indebtedness beyond the limits of the Constitution; and that such election, if carried, must be held for naught for that reason; and according to principle and authority such is the law notwithstanding that decision.

Hedges vs. Dixon Co., 14 Sup. Ct. Rep. 71.
Town of Andes vs. Ely, 15 Sup. Ct. Rep. 954.

But there was no election and could be none for want of registration. There was no law in force in time providing for registration; there was no registration in fact. If language can be made strong enough to prohibit a legal vote without registration, it is found in the State Constitution. Not only must the legislature enact the law, but require a compliance with it "before

any elector shall be allowed to vote." This is not compulsory except as to cities and towns having a population of over 500 inhabitants.

By Section 29 of Article I. of the State Constitution it is declared: "The provisions of this constitution are mandatory unless by express words they are declared to be otherwise."

So that over and over affirmatively and negatively the constitution has endeavored to fix this one principle. "It is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachment thereon. Their motto should be *obsta principiis.*"

Whence comes the authority, and what is the principle in obedience to which the court may disregard this constitutional provision as to registration? On construing constitutions see Lake County v. Rollins, 130 U. S., 669.

Where does the right to vote come from except from the constitution and the legislature? And how can the legislature give it except in compliance with the constitution?

We are not driven to speculate as to what the courts might hold or what the remedy might be if for the purpose of carrying on the city government one should be performing the duties of a public officer who had been voted for only by non-registered votes. By the performance of such duties, whether by an officer *de jure* or *de facto*, no private individual suffers legal injury. And courts recognize that it is also the inten-

tion of the constitution that these governments shall be carried on.

But the constitution does not contemplate, nor can the courts find any impelling immediate necessity for a municipal corporation incurring this extraordinary indebtedness. And therefore, until the legislature shall have provided all the essential machinery required by the constitution, it is presumed the matter can wait.

ABSENCE OF THE THING FOR WHICH THE DEBT WAS ALLOWABLE.

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Another fatal vice in the transaction and one in which C. B. Wright appears as ally or accomplice, is the failure of the city to become the owner and controller of any water supply and works for supplying the city with water. We are not considering now the fraud perpetrated in pretending to sell that which belongs to another, but the absence of the condition upon which alone the constitution permits the existence of this pretended indebtedness.

These parties dealing with the city were bound to know not only the general rule of law as to failure of consideration, but the express inhibition of the existence of the indebtedness—except on the condition as to ownership And while it is true that in the deal the city did acquire the ownership of some of the property, yet it appears from the complaint that the vast bulk, almost all that gave value to the supposed purchase, was not obtained.

Taking the constitution, the legislation and the ordinance together and applying the language of the

constitution to what should occur in the future, the only meaning in connection with this transaction is that the city shall become the owner of that for which it contracts.

Applying ordinary legal principles we arrive at the conclusion that if it gets substantially what it contracts for, the contract will stand and the condition of the constitution will be satisfied. But if on the contrary the difference is so great, so material as to show on the face that a reasonable person would not have made the deal but with the expectation of getting that which he does not, then the contract fails and the condition contemplated by the constitution is not satisfied.

And here appears a reason—if the court should deem it necessary to consider that question—for holding that the city had no power to issue bonds that could be negotiated so as to cut off equitable defenses.

City of Brenham vs. German Am Bank, 12 Sup. Ct. Rep., 559.
Police Jury vs. Britton, 15 Wall, 566.
Merrill vs. Monticello, 11 Sup. Ct. Rep., 441.

For the purpose of maintaining the constitution in its integrity it might not be a strained construction to hold that in cases of purchase under this provision such negotiable instruments could not be issued even though they were generally permitted, for if necessary a court will be diligent to find a way of giving full force and effect to a constitutional provision.

Section 91 of the charter of 1890 of the city of Tacoma, under which the city was operating at the time of the issuance of these bonds, was, and is, as follows:- "Sec.91, To secure any existing indebtedness of the city, or any indebtedness about to be incurred, the city may, by ordinance, authorize the issuance of the bonds of the city therefor, and pledge the faith and property of the city for the payment of such bonds, and direct the time and manner for the payment of both principal and interest thereof, and may, from time to time, authorize the refunding of any indebtedness of the city. No bonds shall be sold until they have been advertised at least thirty days preceding the day of sale, nor shall any bonds of the city be sold for less than par and accrued interest, or for a longer term than twenty years."

Section 6 of Chapter VIII. of the Session Laws of Washington, of 1893, which authorizes cities and towns to purchase, construct, and maintain certain public works, and issue bonds therefor, including water works, is as follows:- "Such bonds shall be sold in such manner as the corporate authorities shall deem for the best interest of the city or town. A register shall be kept of all bonds, which register shall show the number, date, amount interest, name of payee, and when and where payable, of each and every bond executed, issued or sold under the provisions of this act."

It is respectfully submitted that when the individual invokes the power of the courts to restrain the act which is a violation of the constitutional guaranty, that he shall not be deprived of his property without due process of law; the party who is thus depriving him of his property is the defendant in such action and the only proper party defendant thereto.

The facts of the case were clearly and fully stated in the complaint, mainly for the purpose of showing that the tax levy taking of plaintiff's property was a taking without due process of law. While C. B. Wright, the holder of the $1,750,000 bonds in question, may continue to employ his own counsel in this case to help hold the City up in the controversy and defend against the charge he is without right to be a party to the case even if he desired it so. Much less has he the right or power by his mere absence beyond the jurisdiction of the court to turn to naught the individual's constitutional protection. Whatever the city pleads and admits or whatever judgment is given in this case is binding only as between the parties hereto. C. B. Wright is not making the tax levy nor diverting the revenues of the City to unlawful purposes; he is not depriving the taxpayer of his property; the defendant City is doing that. It would seem to follow that the defendant City is the only proper or necessary party defendant against such charge.

Foster's Federal Practice, sec. 50, page 94.
Hayes vs. Hill, 17 Kansas 361.
Ryan vs. Lynch et al, 68 Ill., 161.
Leitch et al vs. Wentworth et al, 71 Ills. 147.
Childs vs. Bonorrow, 17 How. 130.

BONDS WERE NOT SOLD.

The law provided that bonds should be sold. It d the power of the City to barter or exchange roperty as was done in this instance. Title ls never legally passed. Any one taking s manner was charged with notice of the er of the City and its officers, and all parties dealing with a municipal corporation are charged with a notice of its powers.

Horton vs. Town of Thompson, 71 N. Y. 518.
Starin vs. Town of Geneva, 23 N. Y. 439.
Hedges vs. Dixon Co., 14 Sup. Ct. Rep. 71.

THE SEYMOUR CASES.

The demurrer admits that the former actions touching this election and the issuance of these bonds, wherein Edwin Seymour was plaintiff, reported in 6 Wash., prosecuted by the nominal plaintiff, but as the agent of the Water Co. and nt owner of the bonds, for the purpose sions adverse to the plaintiff, that to this end and to this purpose there was collusion between the plaintiff, as such agent, and the then city attorney to suppress the facts, which was done, and thus the decisions fraudulently and collusively obtained.

Under these circumstances shall the decisions be held authoritative? Clearly not.

Calhoun vs. Delhi & M. R. Co., 24 N. E. Rep. 27.
Town of Andes vs. Ely, 15 Sup. Ct. Rep. 954.

Referring again to the question of necessary parties.

BONDS WERE NOT SOLD.

The law provided that bonds should be sold. It was beyond the power of the City to barter or exchange them for property as was done in this instance. Title to the bonds never legally passed. Any one taking them in this manner was charged with notice of the limited power of the City and its officers, and all parties dealing with a municipal corporation are charged with a notice of its powers.

Horton vs. Town of Thompson, 71 N. Y. 518.
Starin vs. Town of Geneva, 23 N. Y. 439.
Hedges vs. Dixon Co., 14 Sup. Ct. Rep. 71.

THE SEYMOUR CASES.

The demurrer admits that the former actions touching this election and the issuance of these bonds, wherein Edwin Seymour was plaintiff, reported in 6 Wash., 128 and 437, were prosecuted by the nominal plaintiff, not in good faith, but as the agent of the Water Co. and Wright, the present owner of the bonds, for the purpose of procuring decisions adverse to the plaintiff, that to this end and to this purpose there was collusion between the plaintiff, as such agent, and the then city attorney to suppress the facts, which was done, and thus the decisions fraudulently and collusively obtained.

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Calhoun vs. Delhi & M. R. Co., 24 N. E. Rep. 27.
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Referring again to the question of necessary parties.

Clearwater vs. Meredith, 21 How, 489.
Busch vs. Farrell 1 Block, 566.
Barnly vs. Baltimore, 6 Wall. 285.
Palmer vs. Stephens, 100 Mass. 466.

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From the admitted facts it appears that no one has ventured or hazarded anything on the faith of these bonds held by C. B. Wright. He well knew he incurred no hazard of loss in the barter and trade by which they went to him. It was a game without chance of loss to him, but with chance of gain of over $1,200,000, for it goes without saying that when the bonds are adjudged invalid in an action yet to be brought thereon the property now in the possession of the City, as a result of this involvement, would be returned; as a natural sequence to such adjudication. So, unless the said Wright surrenders the said bonds and takes back his property without such action, he and he alone may say whether or not he will have such action and adjudication; his rights are there not here.

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As to the lawlessness of the proceeding by which these bonds were given to C. B. Wright, viz., the want of due process of law, the facts pertaining thereto are clearly and fully stated in the complaint and as clearly and fully admitted by the demurrer.

In view thereof can it be said on behalf of the defendant City that this bond liability of $1,750,000 was incurred according to law, by due and legal procedure. If so, the plaintiff's contention here is untenable, but if the attempt to incur such liability simply consists of a continuous defiance and violation of the law and the constitution regulating and limiting the power of the

City touching the same then it is invalid and it follows that the taking of said plaintiff's property by the defendant City is a taking without due process of law; *and this is the exact proposition involved in this case and presented here for consideration and decision.*

So grievous is such a wrong and so sacred is the right violated thereby, that the individual, whose rights are so assaulted, may not be limited to the state courts for protection, but if he miscarry there, he may have hearing and protection in the Supreme Court of the nation.

Forged bonds, the fruits of crime solely, would be such invalid and vicious things that to take the property of the individual by tax levies, in the name of the city, to pay the amounts named in such bonds, would be depriving him of his property without due process of law, nor would the fact that the accomplice who helped in the forgery was absent from the State defeat the action against the city to stay such wrong. If the bonds were not forged outright, but were issued in the name of the city in violation of the express provisions of the State Constitution touching the identical matter, such tax levy and taking of property to pay them would none the less be depriving the individual tax payer of his property without due process of law.

6 Am. and Eng. Ency. of Law, 43, and notes.

It is admitted that no water nor right to water, no water supply nor right to water supply, was acquired by nor in any way constituted any part of the consideration of this $1,750,000 of debt attempted to be incurred by the transaction described in the complaint.

It is admitted that the thing essential to the right to incur the debt, and upon which the transaction was supposed to rest, was not present, but wanting. It is believed that for this reason alone the debt thus foisted is invalid, because in violation of Section 6 of Article 8 of the State Constitution, which is in the words following:

"No county, city, town, school district or other municipal corporation shall for any purpose become indebted in any manner to an amount exceeding one and one-half per centum of the taxable property in such county, city, town, school district or other municipal corporation without the assent of three-fifths of the voters therein voting at an election to be held for that purpose, nor in cases requiring such assent shall the total indebtedness at any time exceed five per centum of the value of the taxable property therein, to be ascertained by the last assessment for State and county purposes, previous to the incurring of such indebtedness, except that in incorporated cities the assessment shall be taken from the last assessment for city purposes.

Provided, That no part of the indebtedness allowed in this section shall be incurred for any purpose other than strictly county, city, town, school district or other municipal purposes.

Provided further, That any city or town with such assent may be allowed to become indebted to a larger amount, but not exceeding five per centum additional for supplying such city or town with water, artificial light and sewers, when the works for supplying such light and sewers shall be owned and controlled by the municipality."

The said $1,750,000 of bonds now held by C. W. Wright incident to this water supply involvement, is of this five per centum, so distinguished and conditioned by this last provision of this section of the constitution. It will be observed that such debt can only be incurred

for supplying the city with water, light and sewers in connection with the ownership of the works. Without a water supply the flumes and pipes and the sewer drains of the city are useless and worthless, so it clearly appears not only from the reason and nature of things, but from the language of the constitution that this debt may be incurred for the supply. That a water supply, as distinguished from the flume, pipes and drains, is the controlling consideration for which this debt may be incurred, and without which it could not be incurred.

If bread were the essential thing a stone would not suffice.

If a water supply in connection with pipes, flumes, engine pumps and sewer drains was the essential thing, dry pipes, flumes and sewer drains without a water supply will not suffice, for if they are sufficient in this case then this constitutional provision has failed of its purpose, leaving the individual with a debt burden upon him, stranded in a city without water supply and deprived of all power to acquire one, and the very purpose of this constitutional provision at the same time being to prevent such disaster.

THE EXCESSIVE AMOUNT OF THE BONDS.

The assessment in existence and which controls the amount in this matter, being $41,553,440, and it being admitted here that bonds had already been issued for sewers by the defendant city in the amount of over $21,000, and the proposition at this so-called election being for the sum of $2,150,000 on account of this water deal, it is impossible by any process of reasoning or of

any curative acts of the court to get within the five per cent. limit of the constitution in the premises, and for this reason are the bonds void.

Hedges et al. vs. Dixon Co., 14 Sup. Ct. Rep., 71.

THE CONSTITUTIONAL PROVISION FOR REGISTRATION OF THE ELECTORS.

We come now to the other provision of the constitution of the State which was defied and violated in this proceeding. It is conceded that the pretended election for the consent of the electors was without registration or other means of discriminating between legal and illegal voters, that there were not legal voters in sufficient number to give the required consent. Does it not result that the so-called election was as lawless and futile in legal effect as the actions of a mob, so because in defiance and violation of the provisions of Section 7 of Article 6 of the State Constitution, which is in the words following :

"The legislature shall enact a registration law and shall require a compliance with such law, *before any elector shall be allowed to vote;* provided, that this provision is not compulsory upon the legislature except as to cities and towns having a population of over five hundred inhabitants. In all other cases the legislature may or may not require registration as prerequisite to the right to vote."

It is doubtless needless to say that neither by enactment nor by omitting to enact can the legislature affect, much less overturn, this constitutional provision.

By the organic law of the State registration is prerequisite to the right of any elector to vote in the city at any election therein either for or against a candidate

for office, or for or against a debt on the city. How can it be contended that this was not a lawless and void election? Counsel for the city have not had the hardihood to so contend, but have confidently assumed that the Seymour case constitutes a protective cloak to this wrong, and that by the saving grace thereof the fact of a lawless instead of a lawful election lies buried beyond resurrection. But we deny this, in the belief that the truth survives such assaults; that the constitution of the State is paramount to the power of the defendant city; that both the truth and the constitution will be upheld here, despite this bogus Seymour case, despite the fraud and official decadence that produced it, and made this case a necessity.

What there is in this Seymour case to give it such vicarious character, is not perceivable upon an examination of it.

The case is reported in 6 Wash., 138.

In it the managers of it submitted certain guarded questions to the Supreme Court of the State. Among them was one as to the legislative enactment providing a registration law, and on page 151 the court's response thereto is as follows:

"5. We have but one registration law in this State, which is found in Chapter 8, General Statutes. Section 467 declares that the provisions of the law shall apply to all elections for municipal and other officers, but we fail to find any application of it to elections of this kind. Section 9 of the Charter requires registration as provided by the general laws of the State, and Section 13 declares that no person shall be entitled to vote unless he is a qualified elector under the State law, and has registered as provided by law. But there being no State law requiring registration at elections of this

character, these provisions of the Charter are inoperative and any elector can vote. The amendments to the registration law passed in 1893 do not affect this matter."

It is assumed that this avoids the constitution. We submit that the rule touching the respect to be given to the decisions of State Supreme Courts construing legislative and constitutional provisions of the State, is well understood, but not by force of such rule could or would these expressions of the court be tortured into a construction of this Section 7 of Article 6 of the Constitution.

Besides, in view of the way in which this Seymour case was commenced and conducted by the parties thereto, the decision obtained therein is not binding as authority on any court.

Town of Andes vs. Ely, 15 Sup. Ct. Rep., 954.

And it is apparent that the vice of the case there referred to was not half so rank as the vice of this Seymour case.

It is evident that the only way that any election showing a semblance of assent to this proceeding could have been held was by ignoring this constitutional provision, the very purpose of the provision being to prevent the very wrong which was enacted by the defiance and violation of it.

It is not a case of defective or irregular compliance with the provisions of an existing statute conferring authority to hold such election. It is a case where it is said that the legislation on the subject of elections is defective touching registration, to the extent of not covering elections of this kind. Yet the constitution of

the State and the charter of the city both declare registration to be an essential prerequisite thereto.

15 Am. and Eng. Ency. of Law, 1039-1042.
6 Am. and Eng. Ency. of Law, 293-294.

No other kind of election can be tolerated.

15 Am. and Eng. Ency. of Law, 1042-note 3.

The now well known and admitted facts of this gigantic swindle and its wretched results, are certainly enough to cause the shock which their disclosure has given to the property owners of the city, and cause them to turn to the courts with a hope which now hangs in fearful suspense. Yet they who fashioned the conditions, debauched the officials and managed this transaction still hold a sufficient grip upon the forces of the city to paralyze and defeat every effort to right this wrong if the aid of the courts is denied to those who struggle to that end.

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All the foregoing, except the first two pages, are reproduced from the briefs of plaintiff, upon which the case was submitted to the Supreme Court of the State.

That court's opinion and decision against the plaintiff is in the record here and is reported in 42 Pacific Reporter, 542.

By the law and the rule of the Supreme Court of the State it is required that errors and questions for consideration there shall be specified in the printed briefs therein. See Rule 8, 11 Wash., 716, and Sess. Laws 1893, p. 127.

The question presented in the complaint and in-

volved in this case was so specified and urged upon the attention of that court.

The opinion and judgment in the case shows the manner in which this question was treated and disposed of there.

The case comes here that the question may be considered and decided by this court.

We state it again :

Do the facts set forth in the complaint show that plaintiff is being deprived of his property by force of a departure from due process of law on the part of the authorities of the State ? Or is the result by force of due and orderly procedure in conformity with the restraints, limitations and conditions prescribed in the premises by the organic law ?

In the case of Scott vs. McNeal, 14 Sup. Ct. Rep., 1112, the court say :

"The fourteenth article of the amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains, 'Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.' These prohibitions extend to all acts of the State whether through its legislative, its executive or its judicial authorities, repeating the words of Mr. Justice Johnson in Bank vs. Oakley * * * was intended 'to secure the individual from the arbitrary exercise of the power of government unrestrained by the established principles of private rights and distributive justice.'"

In that case the arbitrary exercise of the power of the State government constituting a taking of property

from the individual without due process of law, was by the judicial authority of the State, viz.: the Probate Court of Thurston county. In the case now under consideration the City of Tacoma, a functionary of the State, clothed with governmental powers, and in the arbitrary exercise thereof commits the acts here complained of as constituting a taking of the property of the individual without due process of law.

We contend that the taking of property by the city, by special tax levies for a specific purpose, or debt named and designated in the levies made for that purpose, is the taking of property without due process of law, if the said purpose or debt so designated has no valid existence.

To use this 5 per cent. of credit provided by the Constitution of the State, which is now represented by the said $1,750,000 of bonds in the hands of C. B. Wright, certain restrictions, limitations and conditions were by the Constitution of the State laid upon the city pertaining to the exercise of this governmental power upon the part of the city, an observance of which were essential to due procedure therein.

The city is without right or authority to take from the property owners of the city by tax levies upon their property there, this $1,750,000 as principal and a like sum as interest, because all the restrictions, limitations and conditions prerequisite to the use of such credit, the creation of such debt and the issuance of such bonds were ignored and violated, so that what was done in the premises in the name and by the governmental power of the city, and is being done in the levy and

collection of the said taxes levied for such purpose, constitute an arbitrary exercise of the power of government unrestrained by the established principles of private rights and distributive justice, and if allowed to be upheld, destructive of the property rights and interests of the property owners of the city to an extent appalling to contemplate.

These limitations limit the right to use such credit to a specific purpose, and limit the whole amount for such purpose to a five per centum, and within these limits the city is further restrained in its right and authority in the premises by the condition that the electors of the city shall consent thereto, and that such consent shall be expressed at an election held for that purpose under a registration of the electors participating therein.

The opinion and decision of the Supreme Court of the State in this case endorsing the proceedings complained of is made a part of the record here.

In this opinion we notice some remarkable expressions of the court about the Seymour cases, and the allegations of the plaintiff touching the collusive character of those cases. If the court has gone beyond its province in this particular to collide with the truth, the truth will nevertheless be maintained even against such an assault. Referring thereto we quote therefrom as follows:

"But appellant insists that the opinion in that (Seymour) case relating to registration was based on the statute alone, and that the counsel for the respective parties to that litigation suppressed the true facts in

that case, and that the provisions of the constitution of this State upon the subject of registration was not called to the attention of the court. * * * The appellant further insists that inasmuch as the legislature of the State of Washington has not made provision for registration for elections of this character, there is no constitutional basis of authority for holding such an election, and that the bonds for that reason are absolutely void. * * * This court will take judicial notice of its records, and of which issues were presented for determination by the record in a given case, and will not entertain or consider an allegation of the character contained in paragraph 7 of the complaint herein when it appears from an inspection of such record that the matters so alleged are unfounded. * * * An inspection of the brief in that case discloses that the question was discussed and fourteen pages of the brief of respondent therein were entirely devoted to the discussion of the claim that registration was essential to the validity of the then proposed election."

Touching this reference by the court to the briefs in the said Seymour case, we most respectfully show here that the same were attached and made a part of the petition for a rehearing of this case there. Said petition being denied an exemplification thereof, including said briefs, was made a part of the record here. We most respectfully request scrutiny thereof. Upon such scrutiny it will be found that neither in the pleadings in the case (the same being set out in full in said briefs), nor in the briefs is there any issue touching nor the slightest hint or reference to the said provision of the State Constitution on the subject of registration, and that there is an entire absence of discussion of such or any constitutional provision on the subject.

It will likewise be observed that the parties thereto were so happy in their collusive relations that they printed their said briefs under one cover and one con-

Record on file for exemplification of date of filing briefs and of fact that briefs were joint, printed, under the court, and one contest.

tract. That the so-called taxpayers original complaint therein was sworn to March 7, 1893; the case commenced in the court below, appearance and plea of the defendant city therein, judgment, appeal and all in the Superior Court with briefs printed and filed in ten days.

Opinion and decision completed and filed March 24, rehearing waived and mandate and judgment followed without delay.

This Seymour case, like Jarndyce vs. Jarndyce, was one in equity, but the rate of speed was different. This Seymour case had the speed of the lightning express, and stopped not at the flag stations. The so-called taxpayer who headed it, and all the rest on board were of one mind and one design. All real taxpayers were barred out by that speed. Yet the Supreme Court of the State knowing its decision in this case might be reviewed here, interposed this plea denying the seventh paragraph of plaintiff's complaint, being that part showing the collusive character of this Seymour case; and that court seems to insist that this bogus Seymour case is an adjudication against real taxpayers thus denied notice and hearing, and thus left unheard; and to insist that it shall stand as a shield of protection to the State's corrupt municipality and its accomplice in this $3,500,000 assault upon the rights of the real taxpayers of the city. But we submit that this departure by the court from the record is utterly futile of effect for any purpose whatever; not only because it is opposed to the truth, but because the Supreme Court of the State is a court without original jurisdiction in such cases, but with a jurisdiction limited to a review of the

questions arising upon the issues of law made in the court below by the demurrer to the complaint; so that this departure from the due order of procedure is entirely gratuitous. Why did the court ignore the real question in this case and fly to cover in this way? The charge of collusion is against the parties to the case—not the court. Why should the court desire to cover the collusive taint of these cases in defense of the guilty party who had confessed it? The judicial authority of the State is powerless by any act or form of decision to shield any other functionary of the State in its assaults upon the private rights of the individual, and is likewise powerless to forestall the peculiar jurisdiction here to review and control the actions of any functionary of the State in its assaults upon the private rights of the individual, or *the established truth by which such assaults are shown.*

The truth of the allegations of all the paragraphs of plaintiff's complaint was known, alleged and admitted, and so it stood established, on the pleadings of the parties in the court of original jurisdiction. It is not within the province nor power of the review court, nor any other functionary of the State to assail nor obliterate the same. The State may not by one of its functionaries burke the truth so established to the end that another functionary of the State may be covered and protected in a destructive and shameful assault upon the private rights of the individual. Referring now to what is said by the court on this constitutional provision touching registration, when the court declares its position thereon in the following words:

"We think that the prohibition of the constitution

against voting does not apply until after a registration law has been passed and a compliance therewith made possible to the voter. If we are right in this view it is easy to understand why it was not deemed pertinent to make mention of the constitution in the first Seymour case."

By this quotation we see the conception of the court touching its duty and the plaintiff's right in the application of the facts to the constitutional protection invoked. It is a suspended animation conception; while this conception may have a name, place and application in the medical profession, we submit that it is without name, place or application in the range of constitutional law.

The question may arise as to what force and place shall be given here to these expressions of the Supreme Court of the State touching the constitutional provisions of the State.

We take it that in so far as they can be taken as a construction of the language of the provision of the State Constitution, this court will doubtless accord them due respect, but in so far as they declare the conception of "suspended animation" touching this provision of the constitution of the State, they will doubtless be rejected, because such conception is a false quantity in the opinion, and its presence cannot be tolerated in any correct conception of the question involved.

What there is of construction of this provision of the constitution of the State in these expressions of the court, is to the effect that the election for the consent of the electors to the issuance of these bonds is such an election as is covered and included by the language of

the provision of the constitution requiring registration, *and thereby the court fully sustains the contention of plaintiff here.*

What is said beyond this in the way of excusing disrespect for this provision of the constitution is not construction in any sense.

A judicial finding that the legislature has provided a registration law, but that it does not necessarily include in terms the particular election for the consent to this enormous debt, should not have the effect to abrogate this constitutional provision.

It will be observed that the legislature did at its first session attempt to comply with this provision of the constitution by enacting a registration law under which this election would have been held, but for the fact that the result would thereby have been against the scheme—so shown by the admitted facts of this record.

Had the legislature by act declared that such election should be held without registration such act would be void, because not in conformity with the constitution, but to say that this constitutional provision is void or suspended because not in conformity with the legislation on the subject, is novel in the extreme.

By Sections 6 and 7 of Article VI. of the State Constitution it is provided as follows :

"6. All elections shall be by ballot. The legislature shall provide for such method of voting as will secure to every elector absolute secrecy in preparing and depositing his ballot.

7. The legislature shall enact a registration law,

and shall require a compliance with such law before any elector shall be allowed to vote."

Such is the condition imposed by the constitution on the right to vote in the city.

It is shown that there was in this instance a registration law provided, and ample in all respects for this election, but there was a desire to hold this election without registration, and by the record facts it appears that such holding and manipulation of it were essential in order to have a semblance to the result proclaimed by the defendant City, that by the restraints of registration this assault on private rights would have been stayed.

It is now pretended by those who defend this proceeding that inasmuch as this registration law did not specifically describe this election that then this election stood exempt from the restraints and protection given by registration, and such is the pretext urged as an excuse for this wrong.

It will be observed that the constitutional requirement in this particular is a *registration* law as distinguished from an election law.

That there was at the time an ample registration law in force and effect, that a compliance therewith was as easy and practicable in this election as in any other election.

Is it not self-evident that a registration system for general elections in the city is equally practicable and applicable to this election? And may this municipal authority in the presence of this registration law—

its own charter—and this constitutional provision openly defy them to the end and for the purposes shown? We think not.

But let us take this pretext and give to it legs to stand on, that it may be seen and measured.

Let it be assumed for the moment that there had been no registration law of any kind enacted, would the proposition even in such light arise above a mere pretext? We think not, for to say that this mandate of the constitution is not in force or effect till the legislature has enacted the law, is the same as to say that it is entirely without force at all.

It will be observed that constitutional authority is not necessary to legislation of this character, as such conditions upon the manner of exercising the right to vote are clearly within the domain of legislative authority.

6 Am. and Eng. Ency. of Law, 287-288-Notes 4-1.

Furthermore, to say that such constitutional provision is of no force till the legislature acts, is likewise the same as to say that it is not in the power of the people in and by their constitution to prescribe a condition to the right to vote. And no matter how plain, emphatic, reasonable and unqualified the same may be thus prescribed, it remains without force or effect.

While a mere statement of these propositions may be sufficient, yet we will state the law on the subject:

"The legislature cannot extend the right of suffrage to those not possessed of the constitutional qualifications, nor permit it to be exercised in a different way from that prescribed in the constitution."

6 Am. and Eng. Ency. of Law, 263. Note 3.

And the judicial authority of the State is none the less powerless to abrogate such condition. It will scarcely be claimed by counsel that it has been done by the ax of judicial construction, for there is nothing in the expressions of the State Supreme Court to that end, that even pretend to be of that character.

We quote further from the opinion the following :

> 'e should, in view of the facts that bonds of the :otiable in form were thereafter issued, hesitate promulgating a decision discrediting said bonds."

We are unable to understand why the court's consideration and sympathy should thus go out to the gorged and guilty, accomplices of the city, nor why the court should go blind to the admitted allegations of the complaint and go beyond its province to give to the blighted fruits of this lawless transaction a certificate of good quality ; unless the court insists upon assuming that all the paragraphs of the plaintiff's complaint are " unfounded."

In its position that the Seymour cases are conclusive against the cause of plaintiff here, the court assumes that a case in which a taxpayer is party, and showing no constitutional question for cause or defense, is a bar to a subsequent action by other taxpayers showing different causes for action and violations of the constitution and invoking constitutional protection.

The authorities cited by the court in this connection do not sustain any such position. The position is to the effect to declare that the official servant afflicted with imbecility or what not is paramount in power to the people in their constitutional convention, and to the

constitution they solemnly adopt, and is to the effect that a constitutional provision may be made inoperative by the accident, imbecility or fraud of the public official in the pleading in some previous case under his control It would seem that in the nature of things that these constitutional provisions are limitations upon the power and authority of the official in his official acts, that such officials may not, by act of omission or commission, defeat nor abrogate these restraints and limitations upon his power. In these respects the constitution is self-sustaining, without necessity of pickets or guardsmen, and all are charged with knowledge thereof.

According to the views of the court on this subject the constitution of the State is subordinated to such accident, imbecility or fraud, and the people are exposed to the very imposition which they by their constitution had guarded against.

But if this dangerous doctrine is to be accepted as law, and such cases are to have such destructive consequences, we may confidently rely upon it that they shall be cases entirely clear of the taint of fraud and collusion, and shall have been conducted in a way to have afforded opportunity for fair hearing. And even then such case will be allowed as a shield only to the innocent and when invoked by the innocent, and never to the guilty nor upon the invocation of the guilty.

By the opinion and decision of this court in the case of Scott vs. McNeal *supra*, it is shown that because Scott was not party to the proceedings in the Probate

And the judicial authority of the State is none the less powerless to abrogate such condition. It will scarcely be claimed by counsel that it has been done by the ax of judicial construction, for there is nothing in the expressions of the State Supreme Court to that end, that even pretend to be of that character.

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By the opinion and decision of this court in the case of Scott vs. McNeal *supra*, it is shown that because Scott was not party to the proceedings in the Probate

Court by which his land was taken, and was without notice thereof the taking of his property in such proceedings by such functionary of the State was a taking by the State without due process of law, and in the action by Scott complaining of such wrong the decision of the Supreme Court of the State against him, notwithstanding it rested upon the valid statutes of the State, was in reality a decision involving the established principles of private rights distinct from any statutory construction, and in effect an endorsement of such violation of such principles in the taking of property by a functionary of the State, and that such decisions of the State court are not binding upon this court, nor do they constitute due process as to such plaintiff, because in the decision of the case there was involved a principle distinct from the construction of any constitutional provision or valid legislative enactment of the State.

We submit that all assaults made against such principles by any functionary of the State to the end to deprive the individual of his property is in law a deprivation by the State without due process of law, and no decision of the State court against such principles are conclusive here as decisions nor as constituting due process, but despite the same the principles survive to be upheld by this court by the exercise of its ample powers to the end to stay the hand that would commit such violence.

Distinguished from such cases, however, are the cases where the loss or deprivation of property is by the direct and exclusive act of the judiciary of the

State in and by an erroneous construction of the constitutional or valid legislative provisions of the State; in such cases it is said that such loss of property is nevertheless by due process of law as declared in the case of Central Land Co., West Va., vs. Laidley, 16 Sup. Ct. Rep., 80.

By the distinctive rules of this case and the said case of Scott vs. McNeal, we take it that the federal question of due process of law here involved will be measured.

The provisions of the State Constitution laying restraints upon the power of the city in the matter of debt burdens, are set out in the fore part of this brief. It will be observed that by these provisions three specific restraints are laid :

FIRST.

Prerequsite to due process of law in the matter of the $1,750,000 of bonds is that the same can only be issued for a certain specific purpose, viz.: a water supply and works. Under the facts of this case we submit that this debt may not lawfully exist without the presence of this object. Had the case been different from what it is, viz.: had the bonds been sold for money with which to purchase such desideratum, and the money after being so received had been diverted to other uses by the wrong of the officials, the innocent holder of such bonds would be protected as against such wrong; but this case by reason of the facts is not within the range of such principle. In the opinion

and decision here under review, nor in any other, has the State court ventured to express itself upon the question involved in this feature of the case, nor of this provision of the constitution.

When the city by its corrupt officials colluded and connived with the debaucher of official integrity to burden the property owners of the city with a debt of $1,750,000 under the pretense of acquiring a water supply for the city, but in truth instead thereof to simply absorb and appropriate the special credit and means for that purpose provided, leaving the city and its inhabitants without such desideratum, and likewise bereft of the constitutional means with which to ever acquire the same; and with the said credit in the form of the said bonds still clinging to the said wrongdoers charged with a weight of crime and fraud so rank that all possibility of contamination with innocence is entirely cut off, it would seem that such proceeding should be stamped as lawless and subversive of the established principles of private rights and distributive justice, and likewise as undeserving of the sympathy and protection of the judiciary.

SECOND.

For the moment viewing the two Seymour cases as if they were clear of the taint of collusion, and first the one reported in the Sixth Wash., 427, in which the court considers the effect of an excess of the constitutional limit of five per cent. in this debt-making enterprise. After sustaining the constitution in this respect, then in attempting to cure the breach of it the court

say: "But we must sustain the injunction as to all that portion of these bonds which exceeds five per centum of this new assessment, viz.: $69,579.50, or rather, seventy thousand dollars, as they are required to be of the denomination of one thousand dollars each until the taxable value of the city's property reaches an amount sufficient to justify the issuance of this excess." In view of the record facts here that the valuation of the taxable property of the city had been inflated to about double its true value for the purposes of this very transaction, and immediately thereafter dropped from forty-one to twenty-six millions, and the suppressed fact there, that a large portion of the five per centum had already been absorbed for sewers, this act of the court was in more respects than one a leap in the dark.

Observing the violation of the constitution in this respect the court in turn violates an established principle of right in the attempt to cure the violation of the constitution, to-wit: the principle that "when a contract is void for want of power to make it under express statutory or constitutional provisions a court of equity has no authority to give it validity or effect in any way or to any extent."

Hedges et al vs. Dixon County, 14 Sup. Ct. Rep., 71. A case peculiarly applicable.

Furthermore, the court by this act in this respect made no pretense of a cure touching any other or different excess than the single particular one there disclosed. How can it be extended to apply to the other

and further excesses disclosed in this case, or to stand as a cure for the same ?

THIRD.

As to the other Seymour case, 6 Wash., 138: There is no mention of the constitutional provision requiring registration as a prerequisite to a lawful election, but the court simply declared that the legislation on the subject did not specifically apply to elections of this kind.

Inasmuch as there was no mention of the provision of the constitution in this respect, it will scarcely be claimed by counsel that there was thereby any construction of it.

Upon scrutiny it appears that neither of these three constitutional provisions, the observance of which were essential to due procedure in the matter of these $1,750,000 of bonds now held by C. B. Wright, were ever construed adversely to the contention of plaintiff here.

Can any of the expressions of the State court in either of the Seymour cases, or this case, stand in the way of a review and reversal of the judgment in this case by this court ?

We think not, because all of them which go to the construction of the constitutional provisions accept and construe them according to the contention of plaintiff here, and in so far as these expressions independent of construction stand opposed to correct principles they should be disregarded. Necessarily so it would seem,

for to hold otherwise would be subversive of correct principles to the end to uphold the defendant City in the arbitrary exercise of governmental power unrestrained by the established principles of private rights and the specific restraints laid against it by the constitution of the State. And because the decision in this case, as in Scott's case, amounts to a judicial endorsement of the act of another functionary of the State, which act is the act of depriving the individual of his property without due process of law, and so independently of and distinctly from construction of the constitutional provisions invoked. And for the other and distinct cause that the decision itself stands opposed to the established truth of the facts shown by the complaint—opposed to the established principles of right—opposed to the certain specific provisions of the State Constitution, and opposed to the fourteenth article of the amendment of the Constitution of the United States—and fills the measure of the descriptive language of the Chief Justice in Re Kimler, 10 Sup. Ct. Rep., 934, viz.: in the decision "the court committed an error so gross as in law to amount to a denial by the State of due process of law."

By the record facts here it appears that the State court in its opinion and decision in this case shows an unwillingness to be governed either by the logic of truth and correct principles, or the specific mandates of the State and Federal Constitutions, but insists upon standing opposed thereto in behalf of the defendant City.

This corrupt municipality has advanced in its

aggressions until it has become a grievous menace to the private rights of the individual.

Yet the individual has hitherto confidently relied upon the recognized and established principles of right and the specific restraints and limitations of the organic law of the land as ample protection in these respects.

Is it possible by any means that these may fail him? May they not always be upheld here—or may they by force of some arbitrary interdict of the State's judiciary be turned to naught; leaving the private rights of the individual a prey to the unrestrained rapacity of the State's corrupt municipality, and the fourteenth article of the amendments of the constitution an empty promise.

Respectfully submitted.

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